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CASES

ON

COMMON LAW PLEADING

SELECTED FROM DECISIONS OF

ENGLISH AND AMERICAN COURTS

PARTS I AND II BY

CLARKE B. WHITTIER, A.B., LL. B.

PROFESSOR OF LAW IN LELAND STANFORD JUNIOR UNIVERSITY

PART III BY

EDMUND M. MORGAN

PROFESSOR OF LAW IN THE UNIVERSITY OF MINNESOTA

AMERICAN CASEBOOK SERIES

WILLIAM R. VANCE
GENERAL EDITOR

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THE AMERICAN CASEBOOK SERIES

THE first of the American Casebook Series, Mikell's Cases on Criminal Law, issued in December, 1908, contained in its preface an able argument by Mr. James Brown Scott, the General Editor of the Series, in favor of the case method of law teaching. This preface has appeared in each of the volumes published in the series up to the present time. But the teachers of law have moved onward, and the argument that was necessary in 1908 has now become needless. That such is the case becomes strikingly manifest to one examining three important documents that fittingly mark the progress of legal education in America. In 1893 the United States Bureau of Education published a report on Legal Education prepared by the American Bar Association's Committee on Legal Education, and manifestly the work of that Committee's accomplished chairman, William G. Hammond, in which the three methods of teaching law then in vogue—that is, by lectures, by text-book, and by selected cases—were described and commented upon, but without indication of preference. The next report of the Bureau of Education dealing with legal education, published in 1914, contains these unequivocal statements.

"To-day the case method forms the principal, if not the exclusive, method of teaching in nearly all of the stronger law schools of the country. Lectures on special subjects are of course still delivered in all law schools, and this doubtless always will be the case. But for staple instruction in the important branches of common law the case has proved itself as the best available material for use practically everywhere. * * * The case method is to-day the principal method of instruction in the great majority of the schools of this country."

But the most striking evidence of the present stage of development of legal instruction in American Law Schools is to be found in the special report, made by Professor Redlich to the Carnegie Foundation for the Advancement of Teaching, on "The Case Method in American Law Schools." Professor Redlich, of the Faculty of Law in the University of Vienna, was brought to this country to make a special study of methods of legal instruction in the United States from the standpoint of one free from those prejudices necessarily engendered in American teachers through their relation to the struggle for supremacy so long, and at one time so vehemently, waged among the rival systems. From this masterly report, so replete with brilliant analysis

and discriminating comment, the following brief extracts are taken. Speaking of the text-book method Professor Redlich says:

"The principles are laid down in the text-book and in the professor's lectures, ready made and neatly rounded, the prediges ted essence of many judicial decisions. The pupil has simply to accept them and to inscribe them so far as possible in his memory. In this way the scientific element of instruction is apparently excluded from the very first. Even though the representatives of this instruction certainly do regard law as a science—that is to say, as a system of thought, a grouping of concepts to be satisfactorily explained by historical research and logical deduction—they are not willing to teach this science, but only its results. The inevitable danger which appears to accompany this method of teaching is that of developing a mechanical, superficial instruction in abstract maxims, instead of a genuine intellectual probing of the subject-matter of the law, fulfilling the requirements of a science."

Turning to the case method Professor Redlich comments as follows:

"It emphasizes the scientific character of legal thought; it goes now a step further, however, and demands that law, just because it is a science, must also be taught scientifically. From this point of view it very properly rejects the elementary school type of existing legal education as inadequate to develop the specific legal mode of thinking, as inadequate to make the basis, the logical foundation, of the separate legal principles really intelligible to the students. Consequently, as the method was developed, it laid the main emphasis upon precisely that aspect of the training which the older text-book school entirely neglected—the training of the student in intellectual independence, in individual thinking, in digging out the principles through penetrating analysis of the material found within separate cases; material which contains, all mixed in with one another, both the facts, as life creates them, which generate the law, and at the same time rules of the law itself, component parts of the general system. In the fact that, as has been said before, it has actually accomplished this purpose, lies the great success of the case method. For it really teaches the pupil to think in the way that any practical lawyer—whether dealing with written or with unwritten law—ought to and has to think. It prepares the student in precisely the way which, in a country of case law, leads to full powers of legal understanding and legal acumen; that is to say, by making the law pupil familiar with the law through incessant practice in the analysis of law cases, where the concepts, principles, and rules of Anglo-American law are recorded, not as dry abstractions, but as cardinal realities in the inexhaustibly rich, ceaselessly fluctuating, social and economic life of man. Thus in the modern American law school professional practice is preceded by a genuine course of study, the methods of which are perfectly adapted to the nature of the common law."

The general purpose and scope of this series were clearly stated in the original announcement:

"The General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limitations of the classroom, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest. The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

"The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject. * * * If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief. * * *

"The following subjects are deemed essential in that a knowledge of them (with the exception of International Law and General Jurisprudence) is universally required for admission to the bar:

Administrative Law.
Agency.
Bills and Notes.
Carriers.
Contracts.
Corporations.
Constitutional Law.
Criminal Law.
Criminal Procedure.
Common-Law Pleading.
Conflict of Laws.
Code Pleading.
Damages.
Domestic Relations.
Equity.
Equity Pleading.
Evidence.
Insurance.
International Law.
Jurisprudence.
Mortgages.
Partnership.
Personal Property.
Real Property. { 1st Year. / 2d " / 3d "
Public Corporations.
Quasi Contracts.
Sales.
Suretyship.
Torts.
Trusts.
Wills and Administration.

"International Law is included in the list of essentials from its intrinsic importance in our system of law. As its principles are simple in comparison with municipal law, as their application is less technical, and as the cases are generally interesting, it is thought that the book may be larger than otherwise would be the case.

"The preparation of the casebooks has been intrusted to experienced and well-known teachers of the various subjects included, so that the experience of the classroom and the needs of the students will furnish a sound basis of selection."

Since this announcement of the Series was first made there have been published, or put in press, books on the following subjects:

Administrative Law. By Ernst Freund, Professor of Law, University of Chicago.

Agency. By Edwin C. Goddard, Professor of Law, University of Michigan.

Bills and Notes. By Howard L. Smith, Professor of Law, University of Wisconsin, and William U. Moore, Professor of Law, Columbia University.

Carriers. By Frederick Green, Professor of Law, University of Illinois.

Conflict of Laws. By Ernest G. Lorenzen, Professor of Law, University of Minnesota.

Constitutional Law. By James Parker Hall, Dean of the University of Chicago Law School.

Corporations. By Harry S. Richards, Dean of the University of Wisconsin Law School.

Criminal Law. By William E. Mikell, Dean of the University of Pennsylvania Law School.

Criminal Procedure. By William E. Mikell, Dean of the University of Pennsylvania Law School.

Damages. By Floyd R. Mechem, Professor of Law, Chicago University, and Barry Gilbert, Professor of Law, University of Illinois.

Equity. By George H. Boke, Professor of Law, University of California.

Insurance. By W. R. Vance, Dean of the University of Minnesota Law School.

Partnership. By Eugene A. Gilmore, Professor of Law, University of Wisconsin.

Persons (including *Marriage and Divorce*). By Albert M. Kales, Professor of Law, Northwestern University, and Chester G. Vernier, Professor of Law, University of Illinois.

Pleading (*Common Law*). By Clarke B. Whittier, Professor of Law, Stanford University, and Edmund M. Morgan, Professor of Law, University of Minnesota.

Property (Titles to Real Property). By Ralph W. Aigler, Professor of Law, University of Michigan Law School.

Quasi Contracts. By Edward S. Thurston, Professor of Law, University of Minnesota.

Sales. By Frederic C. Woodward, Professor of Law, University of Chicago.

Suretyship. By Crawford D. Hening, Professor of Law, University of Pennsylvania.

Torts. By Charles M. Hepburn, Professor of Law, University of Indiana.

Trusts. By Thaddeus D. Kenneson, Professor of Law, University of New York.

Wills and Administration. By George P. Costigan, Jr., Professor of Law, Northwestern University.

It is earnestly hoped and believed that the books thus far published in this series, with the sincere purpose of furthering scientific training in the law, have not been without their influence in bringing about a fuller understanding and a wider use of the case method.

The following well-known teachers of law are at present actively engaged in the preparation of casebooks on the subjects indicated below:

Edward W. Hinton, Professor of Law, University of Chicago. Subject, *Evidence.*

Arthur L. Corbin, Professor of Law, Yale University. Subject, *Contracts.*

James Brown Scott, Professor of International Law, Johns Hopkins University. Subject, *International Law.*

A. M. Cathcart, Professor of Law, Stanford University. Subject, *Code Pleading.*

Albert M. Kales, Professor of Law, Northwestern University. Subject, *Property.*

Harry A. Bigelow, Professor of Law, University of Chicago. Subject, *Property.*

WILLIAM R. VANCE,
General Editor.

SEPTEMBER, 1916.

*

NOTE

A WORD or two in explanation of the following pages may be of service. In general, names and arguments of counsel, unnecessary details in the statement of facts, parts of the opinion not germane to the matter in hand, and of course the headnotes, have been omitted.

In annotations my aim has been to indicate the state of the authorities without overloading the notes. On well-settled points to cite a few of the best cases, with a reference to some encyclopedia or text where the cases are collected, has been my plan. On points less well settled, or concerning which no good collections of cases were available, I have usually cited one case from each state in which authority was found. An attempt was made to cite the most valuable case from each state. On recondite points all the authority at hand has been cited.

On many points there are numerous Code cases accord or contra. These have not been cited. Often a reference to an encyclopedia, where the Code cases are collected, has been added.

Several states, Alabama and Massachusetts, for example, are neither Code nor common-law states. From such states in general only cases that illustrate doctrines prevalent in the common-law states have been cited. Cases depending on a statute similar to some typical Code provision have been omitted.

In dealing with necessary allegations, questions concerning allegations of time, place, description, value and damages have been omitted. These can be dealt with more expeditiously if treated once for all, without repetition for each form of action. They will be so treated in a later portion of the work.

The book will be completed in two additional parts: Part two, about 175 pages, on contract forms of action; part three, about 175 pages, on principles applicable throughout the forms of action.

Part one, entitled "Pleadings in Tort Actions," has been issued. The book will be completed in one additional part, of about 200 pages, dealing with principles applicable throughout the forms of action.

CHICAGO, Ill., March 1, 1912. CLARKE B. WHITTIER.

NOTE

THE general plan outlined above has been adhered to in the preparation of Part III, except that the annotations are somewhat different in character and contain fewer citations of cases. Professor Whittier's analysis of the subject, kindly furnished me by him, has been closely followed.

EDMUND M. MORGAN.

MINNEAPOLIS, Sept. 21, 1916.

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CASES ON COMMON LAW PLEADING

PART I

PLEADINGS IN TORT ACTIONS

CHAPTER I

TRESPASS

SECTION 1.—SCOPE OF THE ACTION

JORDAN v. WYATT.

(Court of Appeals of Virginia, 1847. 4 Grat. 151, 47 Am. Dec. 720.)

This was an action of trespass vi et armis, brought by Wyatt against Jordan, in the Circuit Court of Nansemond.[1]

BALDWIN, J. The instruction moved for by the defendant in the action must be taken as conceding that the injury in question was occasioned by his negligence. He asked the Court to instruct the jury, that "if they should believe from the evidence, that the plaintiff's wood was cut off the defendant's land with his consent, and was lying thereon, and that the defendant, with a view of clearing another part of the land, set fire to the rubbish on the last mentioned part of his land, and not with the intention of burning the plaintiff's wood, and the fire escaped from him, and passed on to the part of the land where the plaintiff's wood was lying, and consumed it, that this action will not lie, and the jury must find for the defendant." It will be seen that the proposed instruction did not assert that the fire was kindled with due precaution and circumspection, or that it escaped from the defendant without his default, or that he made proper ef-

[1] Statement of facts abridged.

forts to arrest it. It cannot be doubted, therefore, in the case supposed, that the plaintiff is entitled to redress, and the question we have to decide is, whether he has sought it in an improper form, by an action of trespass, instead of an action of trespass on the case.

The distinction as to the proper form of action, where the injury to the plaintiff is occasioned by an act of the defendant, is thus stated by an approved writer: "If the injury be forcible, and occasioned immediately by the act of the defendant, trespass vi et armis is the proper remedy; but if the injury be not in legal contemplation forcible, or not direct and immediate on the act done, but only consequential, then the remedy is by action on the case." 1 Chit. Pl. 122. The force adverted to in this passage, it will be seen, is not merely actual force but also force implied by law; and as the law always implies force where the injury is immediate to the person or property of another, it is obvious that the substantial distinction is between direct and immediate injuries on the one hand, and those mediate or consequential on the other. And so it is regarded by Blackstone in his Commentaries, vol. 3, p. 123, where he says: "It is a settled distinction, that where an act is done which is in itself an immediate injury to another's person or property, there the remedy is usually by an action of trespass vi et armis; but where there is no act done, but only a culpable omission; or where the act is not immediately injurious, but only by consequence and collaterally; there no action of trespass vi et armis will lie, but an action on the special case, for the damages consequent on such omission or act." And again, in the same vol. p. 208, 9, the author says: "Whenever the act itself is directly and immediately injurious to the person or property of another, and therefore necessarily accompanied by some force, an action of trespass vi et armis will lie; but if the injury is only consequential a special action of trespass on the case may be brought." And to the same effect, Lord Ch. J. De Gray said in the noted case of Scott v. Shepherd, 3 Wils. 403: "Whether the injury occasioned by the act be immediate and direct or not is the criterion; and not whether the act be unlawful or not. If the injury be immediate and direct, it is trespass vi et armis, if consequential, it will be trespass on the case."

The distinction thus taken is perhaps as well drawn as it could be in a brief definition, but there is some degree of vagueness in the terms employed, so as to vary the sense according to the mode or circumstance of the act in reference to which they are understood; and this requires some precision and even nicety in ascertaining the proper mode of circumstance. The terms "immediate" and "consequential" should, as I conceive, be understood, not in reference to the time which the act occupies, or the space through which it passes, or the place from which it is begun, or the intention with which it is done, or the instrument or agent employed, or the lawfulness or unlawfulness of the act; but in reference to the progress and ter-

mination of the act, to its being done on the one hand, and its having been done on the other. If the injury is inflicted by the act, at any moment of its progress from the commencement to the termination thereof, then the injury is direct or immediate; but if it arises after the act has been completed, though occasioned by the act, then it is consequential or collateral, or, more exactly, a collateral consequence.

There is no better illustration of the distinction than the familiar case, commonly put, of throwing a log into a highway, which in its flight or fall, hits or strikes a person: there the injury is immediate, and the remedy may be trespass; but if, after it has fallen and while lying on the ground, a passenger stumbles over it and is hurt, the injury is consequential, and the remedy must be case.

So, if one digs a ditch or trench, which diverts a stream of water from his neighbor's land, or makes a dam across the stream, which obstructs or checks its current and throws back the water upon the complainant's land, there is an immediate injury, from the digging into the plaintiff's ground, or the throwing up of the earth or stones or logs upon it, to be redressed by the action of trespass vi et armis; in which the consequential damages from the diversion or reflux of the water may be recovered under a per quod, or by way of aggravation. But if the work be not done upon or extended into the plaintiff's land, the injury is consequential merely, and can be redressed only by an action of trespass upon the case. In these instances, and all others that can be put, it is the progress of the act or work which does the immediate injury; and it is the completion of the act or work which thereafter gives rise to the consequential or collateral injury.

Now, in the case before us, the act of the defendant was the making of a fire, which consumed his own stubble and the plaintiff's wood: the injury was immediate from the progress of the flames, and did not arise thereafter, when they had run their course. It is immaterial whether the stubble or wood was first consumed, or whether the torch was applied to the wood or to inflammable matter touching it, or near it, or at whatever distance from it, or whether the flames expired with the wood, or extended beyond it. The whole conflagration was one continuous, entire, immediate act, embracing in its progress the plaintiff's property, completed only by the destruction thereof, and followed, as between these parties, by no collateral consequence whatever. It was therefore a trespass; and any mode or circumstance of the act that has been, or can be relied upon, to shew it was not, will be found upon examination to be utterly irrelevant.

It can avail the defendant nothing that the act was done upon his own land, for it destroyed the plaintiff's property, which was there by the consent and contract of the parties, and as much under the protection of the law there as if lying on the adjacent land of the plaintiff's. Suppose it had been, and the fire set in motion by the

defendant on his own land, had extended into the plaintiff's, and there consumed the plaintiff's goods, would not the act have been a trespass, as substantially, if not so obviously, as if the defendant had entered upon the plaintiff's land and there applied the torch?

A fire let loose by a party on his own land or elsewhere, and sweeping through its course, cannot be divided into imaginary parcels, and some of them treated as collateral consequences of the rest: the whole is one act, as much so as the throwing or rolling of a stone, or the shooting of an arrow, or the firing of a gun, or the exploding of a mine. He who gives a mischievous impulse to matter is the actor, by whatever instrument or agent he acts, and whether he uses muscular strength or mechanical force, or even moral power, as if he commands or procures another to do the act;[2] or whether he excites or inflames into action some dormant quality or property of a substance, natural or artificial, animate or inanimate. If a man wantonly or carelessly strikes the horse of another, and the animal being thereby stimulated into fright or rage, throws his rider or runs over a stranger, the intermeddler becomes a trespasser. So, if he owns an animal known to be dangerous and turns him loose where he has opportunities of doing mischief, and he does, the act is the owner's. Mere acquiescence even, is sometimes treated by law as activity; as if the owner of animals mansuetæ naturæ, as cows and sheep, who is presumed to know their natural disposition to rove, suffers them to go at large, and they intrude upon the lands of his neighbors, without their default, he thereby becomes a trespasser vi et armis.

It is no ground of defence to this action that the defendant was engaged in a lawful pursuit[3] and intended no harm, and that his act would have been harmless but for his carelessness or negligence. He was not the less a trespasser; and in truth his only ground of defence in this or any form of action would have been, that he was in no wise careless or negligent, but had proceeded with due caution and circumspection, and that the injury done by his act was occasioned by unavoidable accident. A man is bound so to conduct himself as to avoid doing damage to the person or property of another, and a slight default will render him responsible: as when he is uncocking a gun and it goes off and accidentally wounds a bystander, whom he did not see, without intending it; or where he accidentally drives a carriage against that of another, though not otherwise blamable than in driving on the wrong side of the road on a dark night, or

[2] But if, though the servant or agent is acting within the scope of his authority, there is no command from the master or principal to do the specific act in question, then trespass does not lie. Sharrod v. Railway, 4 Exch. 580 (1849); Chitty, Pleading, I, 16th Am. Ed., *146; 28 Am. & Eng. Ency. Law, 618.

[3] Vogel v. McAuliffe, 18 R. I. 791, 793, 31 Atl. 1 (1895), semble. Accord. St. Louis Co. v. Dalby, 19 Ill. 353, 375 (1857). Contra. For other citations accord, see 28 Am. & Eng. Ency. 557, 558.

in driving a horse too spirited, or in pulling the wrong rein, or using imperfect harness. Wakeman v. Robinson, 8 Eng. C. L. R. 300.

I doubt not that trespass on the case might have been maintained for the grievance in question;[4] but it by no means follows that trespass is not also a proper remedy. Where the injury is immediate and attributable to the defendant's negligence, I can perceive no good reason why the two remedies of trespass and case should not be concurrent, so that either may be selected; the action of trespass, founded upon the defendant's act, against which his negligence can be no defence; or the action on the case, founded upon his negligence in doing an act which would have been otherwise lawful. In either form of action, the merits of the case would be the same, would fall under the same issue, appear from the same evidence, turn upon the same responsibility, and receive the same adjudication. It would be difficult to maintain, either upon reason or authority, that in such a case a greater degree of negligence would be required by the action on the case than by the action of trespass. Tuberville v. Stamp, 1 Salk. R. 13, 1 Com. R. 33, was trespass on the case, founded upon the defendant's making a fire to burn his stubble, which by his negligence burnt the plaintiff's clothes in his ground adjoining; and the Court held that the defendant "made it (the fire) and must see that it did no harm, and must answer the damage if it did. Every man must use his own so as not to hurt another: but if a sudden storm had risen which he could not stop, it was matter of evidence and he should have shewn it." And the principles of that case were expressly approved by the judges in Vaughan v. Menlove, 32 Eng. C. L. R. 208, which was an action on the case against a party for so negligently constructing a hayrick on the extremity of his own land, that in consequence of its spontaneous ignition, his neighbor's house had been burnt down; and in which it was held that it had been properly left to the jury at the trial, whether, with reference to the caution which would have been observed by a man of ordinary prudence, the defendant had not been guilty of gross negligence. In the latter case, it will be observed, that the fire was not made by the defendant, but sprung from the negligence with which he made and kept his rick; and therefore it was not the case of a negligent act, but of a negligent omission.

[4] Ogle v. Barnes, 8 D. & E. 188 (1799); Blin v. Campbell, 14 Johns. (N. Y.) 432 (1817). Accord. Day v. Edwards, 5 D. & E. 648 (1794); Waldron v. Hopper, 1 N. J. Law, 339 (1795). Contra. See further citations in 6 Cyc. 686.

But if the injury be both intentional and direct, case will not lie. Savignac v. Roome, 6 D. & E. 125 (1794); Wood v. Railroad Co., 81 Mich. 358, 45 N. W. 980 (1890); Wilson v. Smith, 10 Wend. (N. Y.) 324 (1833); Kelly v. Lett, 35 N. C. 50 (1851); Winslow v. Beal, 6 Call (Va.) 44 (1806). Accord. Vogel v. McAuliffe, 18 R. I. 791, 31 Atl. 1 (1895: thinking the injury consequential). Contra.

If the injury was intentional, but indirect, case is proper. Reynolds v. Clerk, 8 Mod. 272 (1725).

The forms of action must, it is true, be preserved, but it is much to be regretted that between their narrow jurisdictions, the merits have been too often lost by a confusion or mistake of boundaries. The best security against the evil is to lean, so far as authority allows, to a concurrence of remedies, when the due administration of justice does not require the exclusion of one by another. The subject, it seems to me, as regards the actions of trespass and case, for acts immediately injurious, is placed on a solid and judicious footing by the cases of Williams v. Holland, 25 Eng. C. L. R. 50, and Percival v. Hickey, 18 Johns. (N. Y.) 257, 9 Am. Dec. 210, besides others, recognizing the principle that where an act, though not wilful, is the result of negligence and the immediate and direct cause of an injury, trespass vi et armis will lie; and that trespass on the case will also lie, though the act be violent and the injury immediate, unless wilful, if occasioned by the carelessness or negligence of the defendant.

I think the judgment of the Circuit Court ought to be affirmed.

The other judges concurred in the opinion of BALDWIN, J. (Absent, BROOKE, J.)

Judgment affirmed.[5]

JAMES v. CALDWELL.

(Supreme Court of Tennessee, 1834. 7 Yerg. 38.)

CATRON, C. J.,[6] delivered the opinion of the court.

The declaration states, that James with force and arms drove, chased, and set his dogs upon the mare of Caldwell, and thereby caused her to run upon and against a stake of wood, with great force and violence, so that said stake of wood penetrated the side of the mare, of which she afterwards died.

It is moved to arrest the judgment, because the facts set forth will not support an action of trespass vi et armis; and it is insisted for James, that the injury of the mare running on the stake was consequential, and case could only be supported. The dogs were the instruments of assault as much as a stone thrown from the hand would have been. The violently chasing the mare was in itself a trespass, if unlawful for the defendant to do so; but the declaration does not state this; yet the chasing of the nag forced her on the stake,

[5] Leame v. Bray, 3 East, 593 (1803); Covell v. Laming, 1 Camp. 497 (1808); Welch v. Durand, 36 Conn. 182, 4 Am. Rep. 55 (1869); Kendall v. Drake, 67 N. H. 592, 30 Atl. 524 (1891); Judd v. Ballard, 66 Vt. 668, 30 Atl. 96 (1894). Accord. Huggett v. Montgomery, 5 B. & P. 446 (1807). Contra.

Trespass lies for intentional direct injury. Post v. Munn, 4 N. J. Law, 61, 7 Am. Dec. 570 (1818); Garraty v. Duffy, 7 R. I. 476 (1863).

Trespass does not lie for indirect injuries. Knight v. Dunbar, 83 Me. 359, 22 Atl. 216 (1891); Garraty v. Duffy, 7 R. I. 476 (1863). See further citations in 28 Am. & Eng. Ency. 617.

[6] Statement of facts and part of the opinion omitted.

and the injury was immediate, and proceeded from the act of the defendant. The whole was but one act, as in Scott v. Shepherd, for throwing a squib, 3 Wils. 403. In that case one was cited much in point to the present. It is this: "If a man be riding on the way, and another man striketh his horse, by which the rider falleth and is hurt, he which is cast off his horse shall have trespass against the other. The stroke given is to the horse, and not to the rider, but he is instantly hurt by the fall, in consequence of the act of striking the horse." This case rests on the ground that the defendant, in committing the trespass, used an agent, the horse ridden; but the whole was one act, proceeding from the defendant, and immediate in point of time. We therefore think this first ground against James, the plaintiff in error. * * *

Judgment affirmed.[7]

BARNUM v. BALTIMORE & OHIO R. CO.

(Supreme Court of Appeals of West Virginia, 1871. 5 W. Va. 10.)

This was an action of trespass, brought to February rules, 1866, in the circuit court of Wood county.

As the questions determined here arose upon the demurrer to the declaration, it is here inserted:

The Baltimore and Ohio Railroad Company were summoned in said circuit court to February rules, 1866, to answer the said Allen S. Barnum of a plea of trespass.

And therefore, the said plaintiff complains that on the sixth day of January, 1866, in a certain car belonging to said defendants (which are a body corporate created by the Legislature of the State of Maryland, but owning a railroad and property in the State of West Virginia), to wit, in a certain car attached to the mail train running on said day, between certain places, among others between the town of Grafton and the city of Parkersburg, both in the State of West Virginia, the said defendants then and there, by their servant or agent, to wit, by the conductor of said mail train, acting under and by reason of the orders, directions, and commands of the said defendants, forcibly and wrongfully ejected, expelled, and put out the said plaintiff from the said car, and from the use, occupation and enjoyment of the same, at a certain station on the route of the said Baltimore and Ohio Railroad, to wit, at the station known as Eaton's Station, in the county of Wood and State of West Virginia, by reason whereof the plaintiff was detained and obliged to remain at said station for a great space of time, to wit, for the space of about twelve hours, and did suffer greatly from cold, hunger, anxiety and fatigue, and

[7] Wood v. La Rue, 9 Mich. 158 (1861) semble; Waterman v. Hall, 17 Vt. 128, 42 Am. Dec. 484 (1844) semble. Accord.

thereby became and was sick, sore, lame, and disordered, and so remained and continued thence, hitherto, during all of which time, he, the said Allen S. Barnum, thereby suffered and underwent great pain and anxiety, and was hindered and prevented from transacting and performing his necessary affairs and business, by him during that time to be transacted and performed; and also, thereby, the said Allen S. Barnum was forced and obliged to, and did necessarily pay, lay out, and expend a large sum of money, to wit, the sum of two hundred dollars, in and about endeavoring to be cured of the sickness, soreness, lameness, and disorder aforesaid. And other wrongs the said defendants then and there did against the peace of the State of West Virginia, and to the damage of the said Allen S. Barnum of ten thousand dollars; and therefore said plaintiff brings this suit."

The court below sustained the demurrer, and the plaintiff appealed.

BERKSHIRE, P.[8] The only questions involved in this case arise on the demurrer to the declaration. The action is trespass vi et armis for the recovery of the secondary or consequential damages, alleged to have been sustained by the plaintiff, by reason of his having been forcibly ejected from a certain car belonging to the defendant, by its agent acting under its advice and order, said agent being then and there the conductor of the train and car from which the plaintiff was so ejected and expelled. It was insisted by the counsel for the appellee, that the proper remedy for the grievance complained of, was an action of trespass on the case, and that trespass vi et armis would not lie upon the case made by the declaration. By section 7 of chapter 148 of the code of 1860, p. 635, it is provided that "in any case in which an action of trespass will lie, an action of trespass on the case may also be maintained." [9] But the converse is not provided, and the action of trespass, therefore, as to the cases in which it will lie, remains as at common law. And it is clear that at the common law, such action could be maintained only when the injury complained of was the direct and immediate result of the act of the defendant complained of. But it never lay for secondary and remote damages, the remedy in such cases (before our statute), being an action of trespass on the case. I am aware of no civil remedy at common law, for a direct and wilful trespass and injury done with force by the defendant to the person of another, except an action of trespass for an assault and battery. An action of trespass on the case will now lie under our statute, and such action would also embrace the consequential as well as the immediate damages resulting from the

[8] Part of the opinion omitted.

[9] In several common-law states statutes have been passed lessening or abolishing the distinctions between trespass and case. Delaware, Rev. St. 1893, c. 106, § 11; Illinois, Hurd's Rev. St. 1909, c. 110, § 36; Maine, Rev. St. 1903, c. 84, § 26; Michigan, Comp. Laws 1897, § 10,400; Pennsylvania, Purdon's Dig. (13th Ed.) p. 3610; Virginia, Code 1904, § 2901; West Virginia, Code 1906, § 3491.

act. In this case, however, the action is not for the assault and battery, or for an immediate injury done to the person of the plaintiff; but it is a trespass vi et armis for the secondary and consequential damages alleged to have ultimately ensued from the original trespass in ejecting the plaintiff from the defendant's car. Authorities were cited to show that an action for an assault and battery committed by its agents would lie against a corporation. The authorities as to this question are conflicting somewhat, and it is unnecessary to decide it, as no such action in this instance has been instituted. The declaration shows a case, therefore, in which trespass at common law would not lie, and for this reason the demurrer was properly sustained. * * *

The remaining members of the court concurred.

Judgment affirmed.[10]

WILSON v. BARKER and MITCHELL.

(Court of King's Bench, 1833. 4 Barn. & Adol. 614.)

Trespass for assaulting the plaintiff, and taking a gun from him. At the trial before ALDERSON, J., at the last Spring assizes at York, the following facts were proved: The plaintiff was shooting on Meltham Moors in the West Riding of Yorkshire, when the defendant, Mitchell, seized him and took away his gun. The taking was wrongful. Mitchell was the servant of a Mr. Peace, to whom the game on these moors was given by certain parties, entitled as holders of allotments under an inclosure act. The other defendant, Barker, was employed by Mr. Peace in protecting the game. Mitchell took the gun to Barker, who, on being subsequently asked for it by the plaintiff, refused to give it up. An endeavour was made, but without success, to shew that Barker admitted having authorized Mitchell to seize it. Alderson, J., was of opinion, that this evidence did not support an action of trespass against Barker, and that, to reach both parties, the form of action should have been trover. A verdict was therefore taken, under the learned Judge's direction, for Barker, and against Mitchell with 40s. damages.

Alexander now moved for a rule to shew cause why a new trial should not be had, on the ground of misdirection. Assuming that Mitchell did not act as Barker's servant in seizing the gun, yet Barker ratified the act by his subsequent conduct, and thereby made himself liable as a trespasser. In Badkin v. Powell (Cowp. 478), Lord Mansfield says, that a pound-keeper is not liable in trespass for mere-

[10] In trespass consequential damages may be recovered with direct damages. Taylor v. Rainbow, 2 Hen. & M. (Va.) 423, 441 (1808). A party may waive the trespass and sue in case for the consequential damages alone. Carleton v. Cate, 56 N. H. 130 (1875); Furman v. Applegate, 23 N. J. Law, 28 (1850). For other cases see 6 Cyc. 685.

ly taking in cattle brought to the pound by other persons, who act at their own peril if the taking has been wrongful: but "if he goes one jot beyond his duty and assents to the trespass, that may be a different case." In Aaron v. Alexander (3 Camp. 35), where a wrong person was apprehended under a warrant and carried to the watch-house, the watch-house keeper, who received and detained him, was held liable in trespass, though he had no means of ascertaining the identity of the party. (LITTLEDALE, J. There the detention was a fresh trespass.) In Hull v. Pickersgill and Others (1 B. & B. 282), the defendants (in trespass) were creditors who had seized the goods of an uncertified bankrupt for debts incurred after the bankruptcy; but it appeared that the assignees had afterwards surrendered to the defendants all their interest in these goods under the commission, and this was held to be a ratification of the seizure as made to the use of the assignees. (PARKE, J. Lord Coke, in 4 Inst. 317, states, as a difference between the forest law and the common law, that, by the former, whosoever receives within the forest any malefactor in hunting or killing the king's deer, knowing him to be such malefactor, or any flesh of the king's venison, knowing it to be the king's, is a principal trespasser; whereas by the common law, "he that receiveth a trespasser and agreeth to a trespass after it be done is no trespasser, unless the trespass was done to his use, or for his benefit, and then his agreement subsequent amounteth to a commandment, for in that case omnis ratihabitio retrotrahitur et mandato æquiparatur; but, by the law of the forest, such a receiver is a principal trespasser, though the trespass was not done to his use." Unless you could prove here that the seizure of the gun was to Barker's use, he cannot be made liable in trespass.)

PER CURIAM. (LITTLEDALE, PARKE, and PATTESON, JJ. DENMAN, C. J., had left the court.) The direction was right; there must be no rule.

Rule refused.[11]

[11] Badkin v. Powell, 2 Cowper, 476 (1776); Prince v. Puckett, 12 Ala. 832 (1848); Gloss v. Black, 91 Pa. 418 (1879). Accord. For views as to the reason for this rule see 3 H. L. Rev. 29, and Pollock & Maitland, Hist. of Eng. Law (2d Ed.) I, 167, 168. For further citations, see 28 Am. & Eng. Ency. 588.

But one who takes by trespass from a trespasser is liable. Bradley v. Davis, 14 Me. 44, 47, 30 Am. Dec. 729 (1836) semble; Cox v. Hall, 18 Vt. 191 (1846).

A bailee cannot be sued in trespass for wrongful acts affecting the property done after the termination of the bailment. 2 Williams' Saunders, 47 aa-cc; Bradley v. Davis, 14 Me. 44, 30 Am. Dec. 729 (1836); Nash v. Mosher, 19 Wend. (N. Y.) 431 (1838). Accord. Campbell v. Stakes, 2 Wend. (N. Y.) 137, 19 Am. Dec. 561 (1828). Contra.

WETMORE v. ROBINSON.

(Supreme Court of Errors of Connecticut, 1818. 2 Conn. 529.)

This was an action of trespass vi et armis, alleging, that the plaintiff (Robinson) was the lawful owner and possessor of a farm of land situated in Lebanon, abutting about one hundred rods on the main town-street, and containing about sixty acres; which was, for many years, possessed by his father and brother, now deceased; and that in front of said farm of land, and nearer to the plaintiff's land than to any other person's, was situated a small natural pond of water; that for a time whereof the memory of man runneth not to the contrary, the owners of said farm have enjoyed the privilege of said water in said pond, and also, when the same was dry, have used and enjoyed the privilege of taking manure out of said pond, which was well known to the defendant; but that the defendant, intending to injure the plaintiff, did, at said Lebanon, on the 20th day of August, 1816, and at divers other times since, maliciously, with force and arms, injure the plaintiff in the uninterrupted enjoyment of the use and privilege of the water and manure of said pond, by throwing stones into said pond, and by endeavouring to cause said pond to be drained, and to prevent the accumulation of manure therein,—all with a set design to injure the plaintiff in his natural right to the water and manure of said pond, a necessary and valuable appurtenant to the usual enjoyment of said farm; which doings of the defendant were against the peace, and contrary to the plaintiff's mind and will.

The defendant pleaded not guilty, on which issue was joined; and the plaintiff obtained a verdict, with 10 dollars damages.

The defendant then brought the present writ of error, assigning the insufficiency of the declaration.

SWIFT, Ch. J. The question in this case, is, whether the declaration is sufficient.

It is contended by the plaintiff, that this is an action for an injury to an incorporeal right, to which he was entitled, by prescription. But there is no averment, that the plaintiff was possessed of such right. He only alleges a possession of a certain farm, in front of which there was a certain pond; and that, from time immemorial, the owners of the farm had enjoyed certain privileges of the water in the pond; not that the plaintiff was possessed of such privilege, or that it was ever appurtenant to the farm. If the plaintiff, however, had stated an incorporeal right by prescription, he should have brought an action of trespass on the case, for the disturbance; for trespass vi et armis will not lie. To maintain this action, then, it is necessary, that the plaintiff should have alleged, that he was in possession of the place where the injury is charged to have been committed. The plaintiff insists, that though the place is not set forth expressly, yet he has alleged, that he was in possession of a certain farm, bounded on the

highway, in front of which, and nearer to his land than any other person's, is a certain pond, where the injury complained of was done; that as he is entitled to the highway, (excepting the public easement) in virtue of being the adjoining proprietor to it, this is equivalent to an allegation that he was in possession of the locus in quo. But he might have been in possession of his farm, and another might have been in possession of the highway; so that this does not amount to an allegation, that he was in possession of the place where the injury was done. Of course, the plaintiff is not entitled to recover in this action.

HOSMER, J. The action brought by the plaintiff to redress the injury complained of, is trespass vi et armis. The defendant was summoned to answer "in a plea of trespass"; and the casting the stones complained of into the pond, is laid to have been done "with force and arms," and "against the peace." Whether the action ought to have been trespass vi et armis, or trespass on the case, is a question involving the merits of the plaintiff's declaration. But, whether it is of one or the other species, depends not on the facts stated, but on the manner in which the suit is instituted.

It is clear beyond a question that the facts alleged in the plaintiff's declaration, do not sustain the action of trespass. The gist of this action is the immediate injury to the plaintiff's possession. 1 Chitty's Plead. 175. The intent with which the act was done, or whether the act was legal or illegal, forms no part of the criterion. Now, the plaintiff complains of no injury to his possession. He merely states an obstruction, by casting stones into a pond, which had been immemorially enjoyed by himself and those under whom he claims, for the procurement of water and manure, as he had been accustomed. The pond does not appear to be on his farm, or in his actual or constructive possession. If any suit is sustainable, it is trespass on the case. But, on this subject I express no opinion, as the point is not before the court.

The judgment complained of, in my judgment, is manifestly erroneous.

The other judges were of the same opinion.

Judgment reversed.[12]

[12] Matthews v. Treat, 75 Me. 594, 600 (1884) semble; Wright v. Freeman, 5 Har. & J. (Md.) 467, 475 (1823) semble; Osborne v. Butcher, 26 N. J. Law, 308 (1857); Lambert v. Hoke, 14 Johns. (N. Y.) 383 (1817) semble. Accord.

Case is the proper remedy. Wright v. Freeman, 5 Har. & J. (Md.) 467, 475 (1823) semble; Cushing v. Adams, 18 Pick. (Mass.) 110 (1836) semble; Osborne v. Butcher, 26 N. J. Law, 308 (1857) semble; Lansing v. Wiswall, 5 Denio (N. Y.) 213, 216 (1848); Greenwalt v. Horner, 6 Serg. & R. (Pa.) 71, 76 (1820) semble; Perrin v. Granger, 33 Vt. 101 (1860). Accord. For further citations, see 6 Cyc. 690.

But the rule is different as to an exclusive right of profit. Y. B. 20 & 21 Edw. I, 206 (1293); Clap v. Draper, 4 Mass. 266, 3 Am. Dec. 215 (1808); Stultz v. Dickey, 5 Bin. (Pa.) 285, 6 Am. Dec. 411 (1812). Accord. Matthews v. Treat, 75 Me. 594, 599 (1884). Contra.

DRAKE v. LADY ENSLEY COAL, IRON & R. CO.

(Supreme Court of Alabama, 1894. 102 Ala. 501, 14 South. 749, 24 L. R. A. 64, 48 Am. St. Rep. 77.)

COLEMAN, J.[13] This action was instituted to recover damages for an alleged injury to realty. The complaint consists of several counts, some of which were framed in trespass, and others in case. The important questions for consideration, and the decision of which will determine the several assignments of error, are: First, whether the facts will support the complaint, in either of its aspects; and if so, second, whether the proper action is trespass or case; and, third, if the action is maintainable, what is the proper measure of damages? The trial court held that the action should be in case, that the statute of limitations for one year applied. * * *

The undisputed facts show that for many years prior and up to the time of his death, which occurred in the year 1890, plaintiff's testator had owned and been in possession of the lands claimed to have been damaged, cultivating them as a farm, and since his death the plaintiff, as executor, had been in possession of the lands; that through the lands there flowed a creek of clear, healthy water, useful for, and used for, watering stock, and at times for drinking purposes; that defendant owned a tract of land above the land of plaintiff, on the same creek, from which, for five or six years previous to the bringing of the suit, defendant had been engaged in mining iron ore, and washing its ore with the waters of the creek; that for this purpose the water was pumped into large reservoirs, and, after utilizing the water in washing the iron ore, it was allowed to escape in a way so as to return to its natural channel, above plaintiff's land. There was evidence also tending to show that, when the water reached plaintiff's farm, it was laden with red clay, refuse ore, and débris, rendering it unfit for stock and drinking purposes, and that in some places a thick sediment or "slush" was deposited upon portions of the farm, impairing its fertility, and in some places it was so deep as to destroy its usefulness for cultivation. * * *

We are of opinion the trial court ruled properly in holding that under the facts of the case the plaintiff could recover only on the counts in case. The boundary line between where trespass ends and case begins is not always easily determined. Under the law the defendant had the right to divert the water from its channel and utilize it in washing the ore. His duty was to return the water to its proper channel. This was done. The tort to plaintiff was neither in the diversion of the water from its channel, nor that defendant used it for his own purposes, but that the use to which it was applied rendered it impure, filled it with clay and objectionable ore and débris,

[13] Statement of facts and part of the opinion omitted.

and in this condition it was carried by the flow of the water to plaintiff's farm. The damage inflicted was neither intentional nor direct nor immediate, but was consequential. The evidence of plaintiff which tended to show that the injury was the result of negligence in failing to provide proper basins to contain the water after use, until the sediment settled and the water became pure, if actionable, was clearly in case. Polly v. McCall, 37 Ala. 21; Pruitt v. Ellington, 59 Ala. 454; Bell v. Troy, 35 Ala. 184; Roundtree v. Brantley, 34 Ala. 544, 73 Am. Dec. 470; Williams v. Hay, 120 Pa. 485, 14 Atl. 379, 6 Am. St. Rep. 719; 2 Wait, Act. & Def. 110. * * *

Reversed and remanded.[14]

HOBBS v. RAY.

(Supreme Court of Rhode Island, 1892. 18 R. I. 84, 25 Atl. 694.)

Trespass on the case by Lemuel R. Hobbs against Frederick A. Ray for false imprisonment. On demurrer to the declaration, and also on demurrer to a plea in abatement. Demurrer to declaration sustained, and plea in abatement overruled.

PER CURIAM. We think the defendant's demurrer to the plaintiff's declaration should be sustained. The facts set out in the writ and declaration show a case for malicious prosecution, and not for false imprisonment; and these actions are quite distinct and different from each other. An action of trespass for false imprisonment lies for an arrest, or some other similar act of the defendant, "which," as is said, "upon the stating of it, is manifestly illegal;" while malicious prosecution, on the contrary, lies for a prosecution which, upon the stating of it, is manifestly legal. Johnstone v. Sutton, 1 Term R. 510, 544. The declaration in the case at bar shows that the arrest complained of was made under lawful process, although wrongfully obtained. There was, therefore, no false imprisonment, the imprisonment being by lawful authority. Nebenzahl v. Townsend, 61 How. Prac. (N. Y.) 353, 356. Imprisonment caused by a malicious prosecution is not false, unless without legal process or extrajudicial. Murphy v. Martin, 58 Wis. 276, 16 N. W. 603; Colter v. Lower, 35 Ind. 285, 9 Am. Rep. 735; 7 Amer. & Eng. Enc. Law, 663, 664, and cases cited. See, also, Turpin v. Remy, 3 Blackf. (Ind.) 210; Mitchell v. State, 12 Ark.

[14] N. C. Ry. v. Holland, 117 Pa. 613, 626, 12 Atl. 575 (1888: a railroad permitted smoke and cinders from its engines to enter the plaintiff's house). Accord. Preston v. Mercer, Hardres, 60 (1656: the defendant permitted filth to collect near the plaintiff's wall and to enter the plaintiff's land through the wall); Kelly v. Lett, 35 N. C. 50 (1851: the defendant retained the water of a creek by a dam and then suddenly opened the dam purposely to injure the plaintiff's land by the rush of water). Contra.

If trespass is improper, no doubt case will lie. Crockett v. Millet, 65 Me. 191 (1875) semble; Lindeman v. Lindsay, 69 Pa. 93, 102, 8 Am. Rep. 219 (1871). In these cases no entry upon the land occurred.

50, 54 Am. Dec. 253, and cases cited; 1 Chitty, Pl. *133, *167. The gravamen of the offense of false imprisonment is the unlawful detention of another without his consent, and malice is not an essential element thereof; while, in an action for malicious prosecution, the essential elements are malice and want of probable cause in the proceeding complained of. But while, for the reasons above given, we think the demurrer should be sustained, yet, as the form of action employed by the plaintiff is case, which is the proper one in actions for malicious prosecution, we see no sufficient reason for sustaining the defendant's plea in abatement to the writ and declaration. The demurrer is sustained, and the plea in abatement is overruled, with leave to the plaintiff to file a motion to amend his writ and declaration.[15]

HALLIGAN v. CHICAGO & R. I. R. CO.

(Supreme Court of Illinois, 1854. 15 Ill. 558.)

TREAT, C. J.[16] This was an action of trespass quare clausum fregit, brought by Halligan against the Chicago and Rock Island Railroad Company. The first three counts of the declaration alleged in substance, that the defendant, on the first of January, 1853, broke and entered two closes, the property of the plaintiff, situated in the county of La Salle, and described as the west half of lot ten in block one hundred and fifty-two, and lot three in block sixteen, in the city of Peru, and pulled down and destroyed two houses standing thereon. The fourth count alleged, that the defendant "on the day and year aforesaid, with force and arms, broke and entered the aforesaid closes of the said Patrick Halligan, and then and there ejected, expelled, put out, and amoved the said Patrick Halligan and his family and servants, and divers other persons, to wit, Michael Pendergast and Alexander Frinkler, tenants of the said Patrick Halligan, (said tenants then and there using and occupying said premises for hire, and paying unto the said Patrick Halligan therefor at the rate of one thousand dollars per annum,) from the possession, use, occupation, and enjoyment of the said premises, and kept and continued the said

[15] Jones v. Gwynn, 10 Mod. 214, 217 (1714); Elsee v. Smith, 1 Dowl. & Ry. 97 (1822); Holly v. Carson, 39 Ala. 345 (1864); Haskins v. Ralston, 69 Mich. 63, 37 N. W. 45, 13 Am. St. Rep. 376 (1888: but see Moore v. Thompson, 92 Mich. 498, 52 N. W. 1000 [1892], where a statute abolishing the distinction between trespass and case was held to make trespass lie); Herzog v. Graham, 9 Lea (Tenn.) 152 (1882). Accord. For further citations, see 6 Cyc. 687.

If the process is void trespass will lie. Morgan v. Hughes, 2 D. & E. 225 (1788); Hunt v. McArthur, 24 U. C. Q. B. 254 (1865); Sheppard v. Furniss, 19 Ala. 760, 764 (1851) semble; Nachtrieb v. Stoner, 1 Colo. 424 (1872); Berry v. Hamill, 12 Serg. & R. (Pa.) 210 (1824). Accord. In a few cases it is said, but not decided, that either trespass or case will lie. Anderson v. Wilson, 25 Ont. 91, 96 (1894); Apgar v. Woolston, 43 N. J. Law, 57 (1881); Morris v. Scott, 21 Wend. (N. Y.) 281, 34 Am. Dec. 236 (1839).

[16] Part of the opinion omitted.

Patrick Halligan and his family and servants, and also his said tenants, so ejected, expelled, put out, and amoved, for a long space of time, to wit, from thence hitherto; whereby the said Patrick Halligan, for and during all that time, lost, was deprived of the use and benefit of the said premises, and of the rents, issues, and profits thereof, accruing to the said Patrick Halligán from said tenants, to wit, at the county aforesaid, to the damage of the said Patrick Halligan." The defendant demurred to the declaration, and assigned as special causes of demurrer to the fourth count, that it alleged two distinct causes of action, and showed the locus in quo to have been in the possession of other parties. The court overruled the demurrers to the three first counts, and sustained the demurrer to the fourth count. The plaintiff thereupon entered nolle prosequi as to the first three counts, and the defendant had judgment on the demurrer to the fourth count. * * *

To maintain trespass quare clausum fregit, the plaintiff must have the actual or constructive possession of the premises. The gist of the action is the injury to the possession. If the premises are occupied, the action must be brought by the party in possession; if unoccupied, by the party having the title and the right to possession. The owner cannot maintain the action, where the land is in the occupancy of his tenant. The trespass is a disturbance of the tenant's possession and he alone can bring the action. Bac. Abr. Trespass, C. 3; 1 Chitty, Pl. 202; Campbell v. Arnold, 1 Johns. (N. Y.) 511; Holmes v. Seeley, 19 Wend. (N. Y.) 507; Bartlett v. Perkins, 13 Me. 87; Roussin v. Benton, 6 Mo. 592; Davis v. Clancy, 3 McCord (S. C.) 422. If the trespass is prejudicial to the inheritance, the remedy of the owner is by an action on the case. He may, in that form of action, recover damages for any injury to the freehold. Bedingfield v. Onslow, 4 Levinz, 209; Jesser v. Gifford, 4 Burr. 2141; Lienow v. Ritchie, 8 Pick. (Mass.) 235; Brown v. Dinsmoor, 3 N. H. 103; Randall v. Cleaveland, 6 Conn. 328; Hall v. Snowhill, 14 N. J. Law, 8.

If Pendergast and Frinkler were in the possession of the lots as the tenants of the plaintiff when the injury was committed, it is clear that they alone can maintain trespass. In such event, the entry was an interference with their possession. The plaintiff had no possession to be invaded. For any injury to the reversion, he has an adequate remedy in another form of action. The count in question does not disclose a state of case, that entitles the plaintiff to maintain the action of trespass. It shows that the lots were in the actual possession of his tenants. It alleges that his "tenants were then and there using and occupying said premises for hire, and paying unto him therefor at the rate of $1,000 per annum." This language clearly implies a leasing of the whole of the lots, and an exclusive possession thereof by the tenants. Nor is there any thing in the count that is necessarily inconsistent with the truth of this averment. It indeed alleges an expulsion of the plaintiff and his family from the lots.

It may, however, be that they were temporarily on the premises as guests of the tenants, or for some purpose consistent with an exclusive right in the tenants. If so, the injury complained of only amounted to a trespass to their persons. The count does not show such a possession in the plaintiff, as authorizes him to maintain trespass quare clausum fregit. It ought clearly to show that he had the actual or constructive possession of the premises or some part thereof. If the lease reserved a part of the lots, or if the plaintiff was at the time of the trespass in the exclusive possession of some portion thereof, the count should so have stated. As respects such portion, the action might be sustained. There was no occasion for the plaintiff to refer to the lease; but having introduced it into the declaration, it was incumbent on him to show that it did not conclude him from maintaining the action.

There are some cases which hold that trespass quare clausum fregit may be maintained by the owner for an injury to the freehold, though the land be in the possession of his tenant at will. Starr v. Jackson, 11 Mass. 519; Hingham v. Sprague, 15 Pick. (Mass.) 102; Curtiss v. Hoyt, 19 Conn. 154, 48 Am. Dec. 149; Davis v. Nash, 32 Me. 411.[17] And it is insisted that this action may be sustained on the authority of these cases. But there is a conclusive answer to this position. It does not appear that the parties in possession were the tenants at will of the plaintiff. The precise character of the tenancy is not stated in the declaration. It is alleged that Pendergast and Frinkler were the lessees of the premises, paying rent therefor at the rate of $1,000 per annum. The inference from this statement is, that the demise was for a definite period, as a month or a year, rather than at the mere will of the lessor. In order to sustain the case on the ground indicated, it should distinctly appear that Pendergast and Frinkler were tenants at will of the plaintiff. Intendments are not indulged to sustain a pleading. If subject to the charge of uncertainty or ambiguity, it is to be construed most strongly against the pleader. If an allegation is equivocal, and two meanings present themselves, the one will be adopted that is most unfavorable to the party pleading. 1 Chitty, Pl. 272; Stephen on Pl. 379.

Judgment affirmed.[18]

[17] Tobey v. Webster, 3 Johns. (N. Y.) 468 (1808) semble; Strong v. Adams, 30 Vt. 221, 73 Am. Dec. 305 (1858) semble. Accord. Bartlett v. Perkins, 13 Me. 87 (1836); Hersey v. Chapin, 162 Mass. 176, 38 N. E. 442 (1894). Contra.

[18] Bedingfield v. Onslow, 3 Lev. 209 (1627) semble; Brooks v. Clifton, 22 Ark. 54, 60 (1860); Roussin v. Benton, 6 Mo. 592 (1840); Holmes v. Seeley, 19 Wend. (N. Y.) 507 (1838); Fitler v. Shotwell, 7 Watts & S. (Pa.) 14 (1844); Bacon v. Bullard, 20 R. I. 404, 39 Atl. 751 (1898). Accord.

Case will lie. Bedingfield v. Onslow, 3 Lev. 209 (1627); Randall v. Cleaveland, 6 Conn. 328 (1827); Bucki v. Cone, 25 Fla. 1, 6 South. 160 (1889); City of Champaign v. McMurray, 76 Ill. 353 (1875) semble; Lienow v. Ritchie, 8 Pick. (Mass.) 235 (1829); Hall v. Snowhill, 14 N. J. Law, 8, 15 (1833); Kent v. Buck, 45 Vt. 18 (1872). For further citations, see 6 Cyc. 692.

COOKE v. THORNTON.

(Court of Appeals of Virginia, 1827. 6 Rand. 8.)

CARR, J.[19] Cooke leased to Thornton a tenement in Fredericksburg for seven years. He afterwards dispossessed him of the tenement, before the expiration of the term; there being about three years of the lease to run when this suit was brought. This is an action of trespass quare clausum fregit, brought by the tenant for this wrong. The declaration shews that there had been no re-entry; but, that the possession gained by the ouster, continued in the landlord.

Several points were made in the court below, but one only was relied on in the argument here, or seems worthy of notice. It is that growing out of the first bill of exceptions. The counsel for the defendant moved the court to instruct the jury, "that admitting the dispossession to be wrongful, they ought not to take into consideration, in their estimate of damages, the injury resulting from the plaintiff's being kept out of possession, from the date of the writ to the expiration," (of the term,) "but only from the time of the dispossession, until the suit was brought;" which instruction the court refused to give.

In this refusal, I think there was a clear error. To maintain this action, there must have been an actual possession when the trespass complained of was committed. Before entry and actual possession, a person having the freehold in law, cannot have a trespass. Thus, it will not lie before entry for a conusee of a fine, or a purchaser by lease and release, or an heir or devisee against an abator. A disseisee may have it against the disseisor for the disseisin itself, because he was then in possession: but not for an injury after the disseisin, until he hath gained possession by re-entry; and then he may support this action for the intermediate damage; for, after the entry, the law, by a kind of jus postliminii, (as Blackstone expresses it,) supposes the freehold to have all along continued in him. I might quote many passages from the books, in support of this.

Co. Litt. 257, a: "The disseisee shall have an action of trespass against the disseisor, and recover his damages for the first entry without any regress; but after regress, he may have an action of trespass with a continuando, and recover, as well for all the mesne occupation, as for the first entry."

Monckton v. Pashley, &c. 2 Ld. Raym. 977. Per Lord Holt: "As to the case of an entry with ouster, it may be set forth specially in the count, or not, with a continuando, or diversis diebus et vicibus, between such a day and such a day; but, then you must prove, that the

[19] Concurring opinions of Judges Green and Cabell are omitted. The President and Judge Coalter were absent.

plaintiff re-entered before the action brought, or else you cannot assign the mesne trespass; for, by the ouster, the defendant has got possession, and he cannot be a trespasser to the plaintiff; but when the plaintiff re-enters, the possession is in him ab initio, and he shall have the mesne profits."

I have seen the rule no where more clearly laid down, than in the case of Case v. Shepherd, 2 Johns. Cas. (N. Y.) 27. Per Curiam: "In this case, the trespass is laid with a continuando, but the distinction, as to the amount of damages, is this: After an ouster, you can only recover for the simple trespass, or first entry, for, where there is an ouster, every subsequent act is a continuance of the trespass. Yet, in order to entitle the plaintiff to recover for the subsequent acts, there must be a re-entry. But, after a re-entry, he may lay his action with a continuando, and recover mesne profits, as well as damages for the ouster."

In the case before us, there was an ouster, and no re-entry. The plaintiff, therefore, could recover for the simple trespass, or first entry only. He could not lay his action with a continuando. The defendant, therefore, might have asked for much broader instructions than he did. He only asked that the jury might be instructed not to give damages from the time of dispossession till the expiration of the lease, but to the date of the writ; and by refusing this instruction, the court virtually told the jury, that they might give damages for the whole term unexpired at the date of the ouster. This was unquestionably wrong.

I think the judgment should be reversed, and the cause sent back for a new trial; upon which, such instructions as result from the principles now laid down, should be given, if asked for.

Judgment reversed.[20]

[20] King v. Watson, 5 East, 485 (1804) semble; Clark v. Hill, 1 Har. (Del.) 335 (1832); Gent v. Lynch, 23 Md. 58, 87 Am. Dec. 558 (1865); Emerson v. Thompson, 2 Pick. (Mass.) 473, 484 (1824); Holmes v. Seely, 19 Wend. (N. Y.) 507 (1838); Alderman v. Way, 4 Yeates (Pa.) 218 (1805). Accord. Page v. Robinson, 10 Cush. (Mass.) 99 (1852); Harris v. Haynes, 34 Vt. 220 (1861) semble. Contra. For further citations, see 28 Am. & Eng. Ency. 573.

Case will lie. Topping v. Evans, 58 Ill. 209 (1871); Files v. Magoon, 41 Me. 104 (1856); Campbell v. Arnold, 1 Johns. (N. Y.) 511 (1806) semble. Accord. Miller v. Bomar, 9 Rich. Law (S. C.) 139 (1855). Contra.

If a disseisee re-enters he may maintain trespass for damage done between the disseisin and the re-entry. Holcomb v. Rawlyns, Cro. Eliz. 540 (1596) semble; Stean v. Anderson, 4 Har. (Del.) 209, 216 (1845); Emerson v. Thompson, 2 Pick. (Mass.) 473 (1824); Brewer v. Beckwith, 35 Miss. 467, 472 (1858); Case v. De Goes, 3 Caines (N. Y.) 262 (1805). See, also, 28 Am. & Eng. Ency. 577.

Statutes are common authorizing the recovery of mesne profits in ejectment. Alabama, Code 1907, § 3839; District of Columbia, Code of Laws 1901, § 995; Florida, Gen. St. 1906, § 1968; Illinois, Hurd's Rev. St. 1908, c. 45, § 33; Maine, Rev. St. 1883 (Supp. 1895) c. 104, § 11; Massachusetts, Rev. Laws 1902, c. 179, § 12; Michigan, Comp. Laws 1897, §§ 10,988–10,994, 10,999–11,003; Mississippi, Code 1906, § 1848; New Jersey, 2 Gen. St. 1895, Ejectment, p. 1289, § 45; Vermont, St. 1894, § 1504; Virginia, Code 1904, § 2751; West Virginia, Code 1906, § 3365.

NACHTRIEB v. STONER.

(Supreme Court of Colorado Territory, 1872. 1 Colo. 423.)

WELLS, J.[21] * * * The plaintiff in the court below complained in effect, that the defendant had procured an inferior court to issue an attachment against the plaintiff's estate in a case where such process was unwarranted by law, and to give judgment and direct a sale of the estate upon mere constructive notice of the proceeding, he being then a resident of the territory, and entitled to actual notice by service of process; that by virtue of the sale so ordered, the defendant had possessed himself of and converted to his own use, property of the plaintiff to the value of several hundred dollars, and that all this was done in the prosecution of a pretended claim of indebtedness which never existed. The jury have found that the facts are as asserted by the plaintiff; the evidence warrants the finding. * * *

The circumstance, that before the alleged trespass a portion of the property was in the possession of a third person who had a special property therein by lien or pledge, does not, as we think, have the effect to defeat the plaintiff's action or modify the rule of damages. True, it is, in general, that in trespass de bonis the plaintiff must show, that at the time of the trespass complained of he had actual possession of the goods, or had property therein, either general or at least special, with the right to the immediate possession, and an outstanding possession in a third person, with the right in such person to retain it until the discharge of an indebtedness or the happening of some other condition might, with reason, be said to disable the general owner from bringing trespass. Gauche v. Mayer, 27 Ill. 134; Thorpe v. Burling, 11 Johns. (N. Y.) 285; Gay v. Smith, 38 N. H. 171.

For in such case the interest of the general owner is merely reversionary and not present, and for an injury to such interest case lies but not trespass. But, in the present case, the demand for which the goods had been held in pledge was paid off by the plaintiff in the attachment, now plaintiff in error, before the levy, which involves the trespass complained of, and we think this, by construction of law, restored the general owner to his possession, for, though the pledgee of goods may clearly enough transfer possession thereof to another, as his servant or bailee, without waiver of his lien, and though, as we conceive, any third person may advance to the pledgee his demand, receiving possession of the goods as his security, and may lawfully retain such possession until repaid his advances, yet the authorities appear to be uniform, that if the pledgee or lienholder set up any title or claim inconsistent with or independent of the lien, this will amount to a waiver thereof. 3 Pars. on Cont. 244.

[21] Statement of facts and part of the opinion omitted.

Therefore, inasmuch as the possession of the constable who levied the attachment complained of was from the beginning independent of and hostile to the lien by which the property had before been held —the very purpose for which the money was advanced to the pledgee being to enable the officer to proceed with the property in a manner inconsistent with the lien—it cannot be said that this incumbrance or special property followed the goods into the custody of the constable. On the contrary, by the payment of the amount for which the goods had before been held, the lien was dissolved and the right to the immediate possession was eo instanti restored to the general owner. * * *

Affirmed.[22]

GILLESPIE v. DEW.

(Supreme Court of Alabama, 1827. 1 Stew. 229, 18 Am. Dec. 42.)

In Greene Circuit Court, James Gillespie declared in trespass against Duncan Dew that, the defendant broke and entered his close, and cut down and carried away sundry timber trees, &c. General issue. Verdict and judgment for defendant. On the trial the plaintiff proved title to the land, and that the defendant had cut timber thereon and carried it away, while the plaintiff was so entitled. It was proved that the plaintiff resided about twenty miles from the land. It did not appear that any one was in actual possession when the timber was cut, &c. The Circuit Court charged the jury that, unless the evidence shewed that the plaintiff by himself or agent, was in actual possession of the land, when the trespass was committed, they must find for the defendant. To which the plaintiff excepted, and here assigned this matter as error.

Judge WHITE delivered the opinion of the Court.

The charge was in accordance with the English authorities, and with the decisions in some of the states in the Union. But in North Carolina, New York and Connecticut, it has been held that, where there is no adverse possession, he who has title, though he has never been in actual possession, may maintain the action of trespass.

The situation of our country requires this modification of the English doctrine. In England, almost all the lands are occupied, but here, the proprietor often lives at a great distance from some of his lands which are not occupied by tenants, and unless they can maintain this action, they must be denied an important remedy for injuries to their property Their right to this remedy is sustained by the strong

[22] Chaunce v. Twenge, Y. B. 11 & 12 Edw. III, 38–40 (1337); Lotan v. Cross, 2 Camp. 464 (1810); Stanley v. Gaylord, 1 Cush. (Mass.) 536, 48 Am. Dec. 643 (1848); Thorp v. Burling, 11 Johns. (N. Y.) 285 (1814) semble; Buck v. Aikin, 1 Wend. (N. Y.) 466, 19 Am. Dec. 535 (1828). Accord.

argument of convenience, and by the respectable authorities referred to by the counsel for the plaintiff.

We are of opinion that, where there is no adverse possession, the title draws with it constructive possession, so as to sustain the action of trespass. Let the judgment be reversed and the cause be remanded.

Judge GAYLE not sitting.[23]

GRAHAM v. PEAT.

(Court of King's Bench, 1801. 1 East, 244.)

Trespass quare clausum fregit. Plea the general issue, (and certain special pleas not material to the question). At the trial before Graham, B., at the last assizes at Carlisle, the trespass was proved in fact; but it also appeared that the locus in quo was part of the glebe of the rector of the parish of Workington in Cumberland, which had been demised by the rector to the plaintiff, and that the rector had not been resident within the parish for five years last past, and no sufficient excuse was shewn for his absence. Whereupon it was objected that the action could not be maintained, the lease being absolutely void by the act of 13 Eliz. c. 20, which enacts, "that no lease of any benefice or ecclesiastical promotion with cure or any part thereof shall endure any longer than while the lessor shall be ordinarily resident and serving the cure of such benefice without absence above fourscore days in any one year; but that every such lease immediately upon such absence shall cease and be void." And thereupon the plaintiff was nonsuited.

A rule was obtained in Michaelmas term last to shew cause why the nonsuit should not be set aside, upon the ground that the action was maintainable against a wrong-doer upon the plaintiff's possession alone, without shewing any title.

Lord KENYON, C. J. There is no doubt but that the plaintiff's possession in this case was sufficient to maintain trespass against a wrong-doer; and if he could not have maintained an ejectment upon such a demise, it is because that is a fictitious remedy founded upon title. Any possession is a legal possession against a wrong-doer. Suppose a burglary committed in the dwelling-house of such an one, must it not be laid to be his dwelling-house notwithstanding the defect of his title under the statute.

PER CURIAM. Rule absolute.[24]

[23] Cairo Co. v. Woosley, 85 Ill. 370 (1877); Gent v. Lynch, 23 Md. 58, 87 Am. Dec. 558 (1865); Safford v. Basto, 4 Mich. 406 (1857); Cohoon v. Simmons, 29 N. C. 190 (1847) semble; McCormick v. Monroe, 46 N. C. 13 (1853); Robinson v. Douglass, 2 Aikens (Vt.) 364 (1827) semble. Accord. McClain v. Todd's Heirs, 5 J. J. Marsh. (Ky.) 335, 22 Am. Dec. 37 (1831). Contra See, also, 28 Am. & Eng. Ency. 578.

[24] Harper v. Charlesworth, 4 B. & C. 574 (1825). Accord.

One rightfully in possession may bring trespass. Colwill v. Reeves, 2 Camp. 575 (1811); Stanton v. Lapp, 77 Atl. (Md.) 672, 675 (1910) semble; Hasbrouck

WINCHER v. SHREWSBURY.

(Supreme Court of Illinois, 1840. 2 Scam. 283, 35 Am. Dec. 108.)

This was an action of trespass commenced by the defendant in error against the plaintiff in error, before a justice of the peace of Morgan county. The justice rendered judgment for the defendant in error, for the sum of ten dollars and sixty-eight cents, from which an appeal was taken to the Circuit Court of Morgan County, where the cause was tried at the November term, 1839, before the Hon. William Thomas, without a jury, upon the following agreed state of facts:

"The plaintiff went upon a tract of land which belonged to the government of the United States, and made ten hundred and sixty rails, and cut and sawed timber. All of said rails and timber were of the value of fifteen dollars, and were made of timber trees situated upon said land. Said rails were lying in piles through the woods, on the land aforesaid, and the sawed timber lying on the land, and in that situation were of the value aforesaid. While the timber was thus situated on said land, the defendant entered and purchased the land of the United States, and paid for it, but had no patent for said land, but a certificate of purchase from the United States. Said defendant prohibited the plaintiff from taking this timber off of his, defendant's land, and went and hauled the rails and timber away, and converted them to his own use, without the consent of the plaintiff. To recover the value of said rails and timber, this suit was brought.

"November 5th, 1839. Samuel Wincher,
"Michael Shrewsbury."

The Court rendered judgment for the defendant in error, for the sum of fifteen dollars.

WILSON, Chief Justice, delivered the opinion of the Court:

The facts of this case are, that the plaintiff below had made, from timber growing on government land, a quantity of rails, and left them piled upon the land. The defendant afterwards entered the land, and took the rails, for which the plaintiff brought this action. I have no doubt of the plaintiff's right of recovery against the defendant. It is true, that the wrongful taking or conversion of the property of another, does not give the trespasser a title, as against the owner, who may follow and recover it as long as it may be identified. But this rule applies only to the owner of the property taken, and not to a stranger.

Had the defendant any title to the rails in question, and how did he acquire it? At the time the trespass was committed by the plain-

v. Winkler, 48 N. J. Law, 431, 6 Atl. 22 (1886); Cook v. Howard, 13 Johns (N. Y.) 276 (1816); Goodrich v. Hathaway, 1 Vt. 485, 18 Am. Dec. 701 (1829). See, also, 28 Am. & Eng. Ency. 579

tiff, the land, and consequently the timber growing on it, of which the rails were made, belonged to the government. The cutting of the timber was therefore an injury and a trespass against the government; and it had a legal remedy. Therefore the defendant had neither a right of property, nor a right of action, at the time of the plaintiff's trespass, in making the rails. To what then did he acquire title, by a subsequent purchase of the land? Certainly not to a right of action for a previous trespass; nor to the timber which had been previously severed from the land, and converted into rails, farming utensils, or any thing else. A certificate of purchase or patent vests in the patentee a title to the land, and generally all that is growing on, or in the contemplation of the law is attached to the land,—as houses, fences, growing timber, grain, &c.; and it is said that fallen timber passes with the land. But that which has been severed from the land, and, by the art and labor of man, converted into personal property, such as implements of husbandry, barrels, furniture, or even rails when not put into a fence, or evidently intended to be so used upon the land, (which could not be inferred if made by a stranger,) do not pass with it, any more than the grain, grass, or fruit which has grown upon, and been gathered from it. In another view of this case, the defendant's liability would seem clear.

The government being the owner of the land, at the time of the trespass by cutting timber, it might, and if not barred by time, may yet recover, in trespass, for the injury done to the land, or, by action of trover, recover the value of the rails, which would certainly be a bar to the defendant's recovery for the same trespass. For if the defendant may convert the rails to his own use, he may recover of the plaintiff for a conversion by him, and thus subject him to make compensation twice for the same trespass.

This would be both unjust and illegal. The vendor and vendee of the land cannot both have a remedy for the same trespass; a recovery by one would be a bar to that of the other. A recovery by the government in an action of trover, against the plaintiff below, for the value of the rails made on its land, would vest the right to them in him; and though it does not appear that any such prosecution has been instituted by the government, yet the right to do so proves the defendant's want of title, either to recover for the trespass on the land, or to take the rails which are the fruits of it. The judgment is affirmed.

Judgment affirmed.[25]

[25] Chambers v. Donaldson, 11 East, 65 (1809); Brock v. Berry, 31 Me. 293 (1850); Currier v. Gale, 9 Allen (Mass.) 522 (1865); Ware v. Collins, 35 Miss. 223, 72 Am. Dec. 122 (1858); Phillips v. Kent, 23 N. J. Law, 155 (1851); Hibbard v. Foster, 24 Vt. 542 (1852). Accord. Jones v. Muldrow, Rice (S. C.) 64, 71 (1838) semble. Contra.

BURSER v. MARTIN.

(Court of King's Bench, 1605. Cro. Jac. 46.)

Trespass. Quare equum cepit a persona of the plaintiff. The defendant pleaded not guilty, and it was found against him. An exception was taken in arrest of judgment, because he doth not say equum suum, or that he was taken from the plaintiff's possession; or otherwise it may be that the plaintiff had not any cause of action, if he had not property or possession: and it may be, for anything which appears in this declaration, that he had not any of them; wherefore the declaration is not good.

GAWDY, FENNER, and YELVERTON, were of that opinion; and that the declaration cannot be aided by intendment, but ought to be certain.

POPHAM and WILLIAMS e contra: because it being alleged quod cepit a persona, it is necessarily to be intended that he had possession. Wherefore &c.—But notwithstanding, afterwards, upon a second motion, for the reasons aforesaid, it was adjudged for the defendant.[26]

SECTION 2.—NECESSARY ALLEGATIONS

DECLARATION IN TRESPASS FOR ASSAULT AND BATTERY.

(Martin, Civil Procedure, 371. Form 15.)

In the Queen's Bench.

On the ——— day of ——— in the year of our Lord 18—.

London } A. B., by X. Y., his attorney, complains of C. D. who has
to wit } been summoned to answer the said A. B. in an action of trespass. For that the said C. D. heretofore, to wit on, &c. with force and arms, &c., made an assault on the said A. B., and beat, bruised, wounded, and ill treated him, insomuch that his life was thereby greatly despaired of, and other wrongs to the said A. B. he the said C. D. then did against the peace of our Lady the Queen, and to the damage of the said A. B. of fifty pounds, and therefore he brings suit, &c.

[26] Bloss v. Holman, Owen, 52 (1558) semble; Purrel v. Bradley, Brownl. & G. 192 (1603); Dunwell v. Marshall, 2 Lev. 20 (1671); Pinkney v. Rutland, 2 Saund. 379 (1671); Haywood v. Miller, 3 Hill (N. Y.) 90 (1842). Accord.

In such a case the person having the possession may sue. Bloss v. Holman, Owen, 52 (1558); Robertson v. George, 7 N. H. 306 (1834); Jones v. Taylor, 12 N. C. 435 (1828); Davis v. Clancy, 3 McCord (S. C.) 422 (1826); McColman v. Wilkes, 3 Strob. (S. C.) 465, 51 Am. Dec. 637 (1849). See, also, 28 Am. & Eng. Ency. 591.

DECLARATION IN TRESPASS FOR AN ASSAULT, BATTERY AND FALSE IMPRISONMENT.

(Puterbaugh, Common Law Pleading and Practice [8th Ed.] p. 357. Form 183.)

In the ——— Court.

——— Term, 19—.

State of Illinois, }
County of ———, } sct.

A. B., plaintiff, by E. F., his attorney, complains of C. D., defendant, of a plea of trespass: For that the defendant, on, etc., with force and arms, etc., in the county aforesaid, assaulted the plaintiff, and seized and laid hold of him, and with violence pulled and dragged him about, and gave and struck the plaintiff a great many violent blows and strokes; and also then and there forced the plaintiff to go from out a certain dwelling-house, in the city of ———, in the county aforesaid, into the public street there and compelled him to go in and along divers public streets, to a certain police office in the said city; and also then and there imprisoned the plaintiff, and detained him in prison there, without any reasonable or probable cause whatsoever, for the space of ——— ——— then next following, contrary to the laws of this state, and against the will of the plaintiff; whereby the plaintiff was then and there not only greatly hurt, bruised and wounded, but was exposed to public disgrace, and injured in his credit and circumstances; and other wrongs the defendant to him, the plaintiff, then and there did; against the peace of the people of this state, and to the damage of the plaintiff of ——— dollars, and therefore he brings his suit.

DECLARATION IN TRESPASS FOR INJURY TO PERSONALTY.

(2 Chitty, Pleading [13th Am. Ed.] pp. *846, *860.)

In the King's Bench.

On ——— the ——— day of ———
in ——— Term, 1 Will. 4.

———, (to wit) A. B. the plaintiff in this suit, complains of C. D. the defendant in this suit, being in the custody of the marshal of Marshalsea of our said lord the now king, before the king himself, of a plea of trespass. For that the said defendant, on, &c. (day of injury, or about it,) with force and arms, &c. at, &c. (venue) drove a certain cart, with great force and violence, upon and against a certain horse of the said plaintiff, of great value, to wit, of the value of £———. there then being, and thereby then and there with one of the shafts, and with other parts of the said cart of the said de-

fendant, so greatly pierced, cut, hurt, lacerated and wounded the said horse of the said plaintiff, that by reason thereof the said horse being of the value aforesaid, afterwards, to wit, on the day and year aforesaid, died, to wit, at, &c. (venue) aforesaid.

And other wrongs to the said plaintiff then and there did, to the great damage of the said plaintiff, and against the peace of our said lord the king. Wherefore the said plaintiff saith, that he is injured, and hath sustained damage to the amount of £———., and therefore he brings his suit, &c.

Pledges, &c.

DECLARATION IN TRESPASS FOR INJURY TO REALTY.

(2 Chitty, Pleading [13th Am. Ed.] pp. *846, *863.)

In the King's Bench.

On ——— the ——— day of ———
in ——— Term, 1 Will. 4.

———, (to wit) A. B. the plaintiff in this suit, complains of C. D. the defendant in this suit, being in the custody of the marshal of Marshalsea of our said lord the now king, before the king himself, of a plea of trespass. For that the said defendant on, &c. and on divers other days and times, between that day and the day of exhibiting this bill, (or if in C. P. "the commencement of this suit,") with force and arms, &c. broke and entered a certain dwelling-house of the said plaintiff situate and being in the parish of ——— in the county of ———, and then and there made a great noise and disturbance therein, and stayed and continued therein, making such noise and disturbance for a long space of time, to wit, for the space of ——— days then next following, and then and there forced and broke open, broke to pieces, and damaged divers, to wit, ——— doors of the said plaintiff, of and belonging to the said dwelling-house, with the appurtenances, and broke to pieces, damaged, and spoiled divers, to wit, ——— locks, ——— staples, and ——— hinges, of and belonging to the said doors, respectively, and wherewith the same were then fastened, and of great value, to wit, of the value of £———. And also during the time aforesaid, to wit, on the said ——— day of ——— with force and arms &c. seized and took divers goods and chattels, to wit, (describe the goods, &c. as in trover) of the said plaintiff, then being found and being in the said dwelling-house, and being of great value, to wit of the value of £———., and carried away the same, and converted and disposed thereof to his own use. By means of which said several premises the said plaintiff and his family were, during all the time aforesaid, not only greatly disturbed and annoyed in the peaceable possession of the said dwelling-house of the said plaintiff, but also the said plaintiff was, during all that time, hindered and prevented from carrying on and transacting therein

his lawful and necessary affairs and business, to wit, at, &c. (venue) aforesaid.

And other wrongs to the said plaintiff then and there did, to the great damage of the said plaintiff, and against the peace of our said lord the king. Wherefore the said plaintiff saith, that he is injured, and hath sustained damage to the amount of £———., and therefore he brings his suit, &c.

HIGGINS & BOGUE v. HAYWARD.

(Supreme Court of Vermont, 1833. 5 Vt. 73.)

HUTCHISON, C. J.[27] This is a writ of error, bringing up the record of an action, commenced by said Hayward against the plaintiffs in error, originally commenced before a Justice of the Peace and appealed to the County Court. We should suppose, from the papers now presented to us, that there was much warm litigation in the County Court, which ended in the plaintiffs recovering a judgment. To reverse that judgment this writ of error is brought. In nullo est erratum is pleaded. The arguments of counsel are too prolix to be published. The first error, insisted upon is a defect in the declaration. The action was trespass for taking a chaise and harness: and the defect complained of as error is the omission of the word force, in the usual expression, with force and arms. There exists, in this state, neither of the reasons, which ever existed in England for making this averment in a civil action when first introduced in England. The civil action was also a criminal process; and, if the plaintiff recovered damages, a fine was assessed to the king. Hence the vi et armis and contra pacem were apt expressions, in reference to one part of the judgment, that must be rendered in the action, if the plaintiff recovered at all. When the Statute 5 W. & Mary, c. 12, abolished this fine, it created a substitute, by requiring the plaintiff, on signing judgment, to pay a fixed sum, which he recovered back in his judgment. And the vi et armis seems as necessary to secure this substitute, as it did before to warrant the fine. But, by the Statute 4 & 5 Anne, c. 16, the omission of vi et armis, and contra pacem, is aided except on special demurrer. See Gould's Pleadings, pp. 188, 189. * * *

We discover no error in this record, and the judgment of the County Court is affirmed, with additional damages and costs. * * *[28]

[27] Part of the opinion omitted.

[28] Parker v. Bailey, 4 D. & R. 215 (1824). Accord. Taylor v. Welsted, Cro. Jac. 443 (1616). Contra. See, further, 21 Pl. & Pr. 817.

HIGHT v. NAYLOR.

(Appellate Court of Illinois, 1899. 86 Ill. App. 508.)

Mr. Justice BURROUGHS [29] delivered the opinion of the court.

This was an action of trespass by the appellee against the appellant, tried by jury in the Circuit Court of Christian County, where a judgment was rendered against the appellant for $300 damages and costs. To reverse that judgment the appellant prosecutes an appeal to this court, and urges as grounds therefor that the court admitted improper and rejected proper evidence; gave improper and refused proper instructions; the verdict is contrary to the evidence, and the damages are excessive.

While the declaration as first filed contained four counts, the first and second were dismissed and the trial had on the third and fourth, both of which charged trespass and imprisonment against the will of the plaintiff and without reasonable or probable cause. The defendant filed a plea of not guilty, and two special pleas, in both of which he set up that he had probable cause. The plaintiff joined issue upon the plea of not guilty, demurred to the two special pleas, and the court overruled it. The plaintiff did not reply to the special pleas, and the trial was had as though they had been traversed.

The bill of exceptions shows that the appellant was a witness in his own behalf, and when testifying admitted that he was not an officer, yet, against plaintiff's will, had arrested him while on the street of the village of Assumption; that at the time he accused him of stealing his bicycle, worth $50; and that after he had arrested the plaintiff, he detained him some five minutes himself, and then turned him over to the night watchman of the village, with directions to hold him under arrest until the defendant found his bicycle; that the night watchman kept the plaintiff upon the street for some forty-five minutes, when defendant directed him to release the plaintiff, which he did; that after he had turned the plaintiff over to the night watchman defendant found that his bicycle had not been stolen, but only removed by a friend from the side of the street in front of the defendant's place of business, where he had left it a short time before.

With these facts admitted there is no force in appellant's insistence that the verdict is contrary to the evidence, because confessedly the defendant, not being an officer with process, had illegally arrested and detained the plaintiff against his will when no criminal offense had been committed or attempted by the plaintiff in the presence of the defendant, which facts established the plaintiff's cause of action and entitled him to a verdict. Sundmacher v. Block, 39 Ill. App. 553; Dodds et al. v. Board, 43 Ill. 95; and Kindred v. Stitt et al., 51 Ill. 401.

[29] Statement of facts and part of the opinion omitted.

Want of reasonable or probable cause not being an essential element of a cause of action for trespass and illegal imprisonment without process, the averment in both counts, that the trespass and imprisonment complained of was without reasonable or probable cause, was mere surplusage and could be disregarded. Johnson v. Von Kettler, 84 Ill. 315; Sundmacher v. Block, supra; Barnes v. Northern Trust Co., 169 Ill. 118, 48 N. E. 31; Burnap v. Wight, 14 Ill. 301; and Higgins v. Halligan, 46 Ill. 173.

The two special pleas, setting up that there was reasonable and probable cause, were not good pleas in bar of the action set out in either count of the declaration, and the court should have sustained the demurrer to them for that reason. * * *

After a careful inspection of the entire record, we find that substantial justice was done the parties thereto by the judgment rendered in the Circuit Court of Christian County; hence we affirm it.

Judgment affirmed.[30]

ROCKER v. PERKINS et al.

(Supreme Court of District of Columbia, 1888. 6 Mackey, 379.)

This was an action of trespass. The declaration alleged that the defendants with force and arms, etc., "wrongfully seized a certain colt of the plaintiff of the value of $150, and then and there carried away the same and converted and disposed of the same to their own use," to the damage of the plaintiff $250.

On cross-examination the plaintiff was asked whether he had not sold, prior to the 29th of November, to one Theodore Plitt, certain of his goods and chattels and received a consideration therefor. He replied that he had executed such a bill of sale, but that it was merely as security for a debt of $500 due Mr. Plitt. That possession of the property had not been transferred to Mr. Plitt, but that he had been permitted by said Plitt to retain said goods and chattels, including the colt in question, with the understanding that if he should fail to pay said debt he (Plitt) might take possession of the said colt and the other goods and chattels mentioned in the bill of sale. Being asked if he had not given a receipt for said $500, he replied that he had, and thereupon he produced the same, which is as follows:

"Received, Washington City, D. C., November 28th, 1884, of Mr.

[30] Fuqua v. Gambill, 140 Ala. 464, 37 South. 235 (1903) semble; Johnson v. Von Kettler, 84 Ill. 315, 318 (1876); Markey v. Griffin, 109 Ill. App. 212, 219 (1903); Lewin v. Uzuber, 65 Md. 341, 348, 4 Atl. 285 (1886) semble; Herzog v. Graham, 9 Lea (Tenn.) 152 (1882) semble. Accord.

Malice need not be alleged. Fuqua v. Gambill, 140 Ala. 464, 37 South. 235 (1903) semble; Lewin v. Uzuber, 65 Md. 341, 348, 4 Atl. 285 (1886) semble; McCarthy v. De Armit, 99 Pa. 63, 70 (1881); Hobbs v. Ray, 18 R. I. 84, 25 Atl. 694 (1892) semble.

In Force v. Probasco, 43 N. J. Law, 539, 541 (1881), it is said that the declaration must allege that the defendants caused the arrest unlawfully.

Theodore Plitt, $500 in full of all the goods and chattels mentioned in a certain bill of sale made by me and wife this date.

"William Rocker.

"Witnesses:

"Lewis Keese.

"J. H. Salzkorn." [31]

Mr. Chief Justice BINGHAM delivered the opinion of the court:

The only question before us is whether or not in the case of a sale such as was shown to have been made here, the plaintiff parted with his property in the colt in such a manner as that the allegation in the declaration that the colt was the colt of the plaintiff is supported by the evidence. In other words, if the plaintiff's possession was by virtue of his arrangement with Plitt, that he should keep the colt until the maturity of the debt, when, if he failed to pay, Plitt was to take possession, were these facts sufficient to support the averment of ownership in the declaration? The position of the defense is that if the plaintiff had only a special ownership of the colt, such as the right of possession under this agreement with Plitt, then in order to recover he must allege such ownership in his declaration, and prove it upon the trial. We are satisfied that there is no authority sustaining that view of the law. It is a well settled rule of pleading that it is sufficient in this class of actions simply to allege ownership in the plaintiff,[32] and then any proof of ownership which will support the action of trespass will be sufficient under such an allegation to entitle him to recover.[33] The mere right of possession is sufficient to maintain the action against every one but the owner, and the allegation that the plaintiff is the owner is well made out by merely proving his right of possession.

The judgment of the court below is reversed, and a new trial ordered.

[31] Statement of facts abridged.

[32] Finch v. Alston, 2 Stew. & P. (Ala.) 83, 23 Am. Dec. 299 (1832); Heath v. Conway, 1 Bibb (Ky.) 398 (1809: "his" goods held sufficient); Smith v. Hancock, 4 Bibb (Ky.) 222 (1815); Stanley v. Gaylord, 10 Metc. (Mass.) 82 (1845); Gray v. Cooper, Wright (Ohio) 500 (1834); Donaghe v. Roudeboush, 4 Munf. (Va.) 251 (1814). Accord.

In Hite v. Long, 6 Rand. (Va.) 457, 464 (1828), it was held that an allegation of possession by the plaintiff is bad.

[33] Willamore v. Bamford, 2 Bulstr. 288 (1615: a specific title alleged will make any evidence sufficient to support the action admissible); Ware v. Hirsch, 19 Ill. App. 274, 277 (1885) semble; Smith v. Hancock, 4 Bibb (Ky.) 222 (1815); Outcalt v. Durling, 25 N. J. Law, 443 (1856) semble. Accord.

SECTION 3.—DEFENSES.

PLEAS OF THE GENERAL ISSUE AND SELF-DEFENSE IN TRESPASS.

(Puterbaugh, Common Law Pleading and Practice [8th Ed.] 367.)

In the ——— ——— Court. ——— Term, 19—.

C. D.
ats. } Trespass.
A. B.

And the defendant, by E. F., his attorney, comes and defends the force and injury, when, etc., and says that he is not guilty of the said supposed trespasses above laid to his charge, or any or either of them, in manner and form as the plaintiff has above thereof complained against him: And of this the defendant puts himself upon the country, etc.

And for a further plea in this behalf, the defendant says that the plaintiff ought not to have his aforesaid action against him, the defendant, because he says, that the plaintiff just before the said time when, etc., in the county aforesaid, made an assault upon the defendant, and would then and there have beaten, bruised and ill-treated him, if he had not immediately defended himself against the plaintiff; wherefore the defendant did then and there defend himself against the plaintiff, as he lawfully might for the cause aforesaid, and in so doing did commit the supposed trespasses in the said declaration mentioned: And so the defendant says, that if any hurt or damage then and there happened to the plaintiff, the same was occasioned by the said assault so made by the plaintiff upon him, the defendant, and in his necessary defense of himself against the plaintiff. And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to have his aforesaid action against him, etc.

PLEA OF LIBERUM TENEMENTUM IN TRESPASS.

(Puterbaugh, Common Law Pleading and Practice [8th Ed.] 381.)

In the ——— ——— Court. ——— Term, 19—.

C. D.
ats. } Trespass.
A. B.

And the defendant, by E. F., his attorney, comes and defends the force and injury, when, etc., and says that the plaintiff ought not to

have his aforesaid action against him, the defendant, because he says, that the close in the said declaration mentioned, and in which, etc., now is, and at the said time (or "several times") when, etc., was the close, soil and freehold of the defendant: wherefore the defendant at the said time (or "several times") when, etc., committed the several supposed trespasses in the said declaration mentioned, in the said close in which, etc., as he lawfully might for the cause aforesaid: And this the defendant is ready to verify; wherefore he prays judgment, etc.

HERRICK v. MANLY.

(Supreme Court of New York, 1803. 1 Caines, 253.)

This was an action of trespass for false imprisonment. The defendant pleaded not guilty. The cause was tried on the twenty-fifth day of May, one thousand eight hundred and three, before Mr. Justice Kent, at the Rensselear circuit. The plaintiff called Samuel Hawley, a constable, and proved by him, that he arrested and imprisoned the plaintiff by order of the defendant. The counsel for the defendant then asked the witness by whose authority he made such arrest and imprisonment? whether it was not by virtue of an execution issued by a justice of the peace, delivered to him as constable, against the now plaintiff, in favor of the now defendant? The judge overruled these questions, being of opinion, that it was sufficient for the plaintiff to prove that Hawley imprisoned him by order of the defendant; and that it was not competent for the defendant to explain by the same, or any other witness, either the cause of the arrest, or the authority by which it was made.

The defendant's counsel then stated, and offered to prove, that Manly recovered judgment against Herrick before a justice; that execution issued against him on that judgment, and was delivered by Manly to Hawley, the constable; that Manly requested Hawley to imprison Herrick on the writ thus delivered, which he did; and that Herrick was liable to be imprisoned on the execution.

These facts, it was contended, might properly be given in evidence under the general issue, inasmuch as the defendant came within the statute for the more easy pleading in suits, &c. The judge overruled the testimony offered, and a verdict was found for the plaintiff for fifty dollars damages.

The case now came before the court on a motion for a new trial.

LEWIS, Ch. J., delivered the opinion of the court. An application is now made for a venire de novo, on the ground of misdirection on the second point of defence.

The defendant having been the mere bearer of the writ (which was an execution in his own suit) from the justice to the constable,

can neither be considered as a bailiff, or deputy, within the letter or spirit of the statute,[34] and, of course, not entitled, under the general issue, to give the special matter in evidence, by way of justification. The testimony, as it was offered, was, therefore, properly rejected.[35] There is, however, a point of view, under which, had it been presented, it would have been proper, and ought to have been admitted. The only ground on which the liability of the defendant is contended for is his having directed the officer, when he delivered him the process, to arrest and imprison the plaintiff. If, then, it could have been shown that the arrest and imprisonment was not a consequence of his instructions to the officer, but in pursuance of a competent and paramount authority, his plea would have been substantiated, and a verdict would have passed for him. For if the arrest and imprisonment was the effect of any other cause than the instructions he gave the officer, he was, emphatically, not guilty, and it was not a case for justification. We are, therefore, of opinion, the verdict be set aside; but it must be on payment of costs, as no misdirection appears. See Schermerhorn v. Tripp, 2 Caines, 108, note.

New trial, on payment of costs.[36]

BOSS v. LITTON.

(Court of King's Bench, 1832. 5 Car. & P. 407.)

Trespass for injuring the plaintiff, by driving a cart against him. Plea—not guilty.

It appeared that the plaintiff was walking in the carriage way in the neighbourhood of Islington, about ten o'clock in the evening, when the defendant, who was driving a taxed cart, turned out from behind a post chaise and drove against the plaintiff, and knocked him down. A policeman, who was called as a witness, stated, that he never walked upon the footpath, it was in so bad a state.[37] * * *

[34] In some jurisdictions statutes have been passed permitting an officer or certain officers to prove any defense under the general issue. The English statutes are stated in 1 Chitty, Pleading (16th Am. Ed.) *546. For similar American statutes, see Bradley v. Powers, 7 Cow. (N. Y.) 330 (1827); Traylor v. McKeown, 12 Rich. (S. C.) 251 (1859). Counsel in the principal case quotes the statute of New York as follows: "If any action upon the case, trespass, battery, or false imprisonment, be brought against any sheriff, etc., or any other person who in their aid or assistance, or by commandment do anything, etc., it shall be lawful for every person aforesaid to plead thereunto the general issue, and give the special matter in evidence." Rev. Laws 1819, p. 234.

[35] Whether evidence of a justification under process is admissible under the general issue is dealt with in later cases.

[36] Manchester v. Vale, 1 Saund. 27 (1666: trespass to land); Gibbons v. Pepper, 1 Ld. Ray. 38 (1695: trespass to the person); Goodman v. Taylor, 5 C. & P. 410 (1832: trespass to goods); Crookshank v. Kellogg, 8 Blackf. (Ind.) 256 (1846); Fuller v. Rounceville, 29 N. H. 554 (1854) semble. Accord.

[37] Part of the case is omitted.

Thesiger, for the defendant, said that he was in a condition to prove that the injury arose from accident.

Comyn, for the plaintiff, replied, that, as it was an action of trespass, with only the general issue pleaded, such evidence could not be received. He cited Knapp v. Salsbury [2 Camp. 500], in which Lord Ellenborough said: "This is an action of trespass; if what happened arose from inevitable accident, or from the negligence of the plaintiff, to be sure the defendant is not liable; but as he in fact did run against the chaise and kill the horse, he committed the acts stated in the declaration, and he ought to have put upon the record any justification he may have had for doing so."

Thesiger referred to a case of Vanderplank v. Miller [1 M. & M. 169], as an authority in his favour.

But it turned out, on reference, that that was an action on the case, and DENMAN, C. J., said: "I take Mr. Comyn's law to be quite correct, that the only question is, did the defendant strike the plaintiff by driving his cart against him?"

Thesiger then referred to the case of Gibbon v. Pepper [2 Salk. 637], in which a special plea was demurred to, and the Court held that it was bad for want of a confession, but said that the defendant might have proved the facts it contained under the general issue.

DENMAN, C. J. I do not see that that case is at variance with the case cited for the plaintiff of Knapp v. Salsbury, as the facts pleaded went to shew that the horse ran away with the defendant, and therefore it would not be his act which produced the injury. I think, upon the evidence produced, which it seems impossible to contradict, that there is no defence on the general issue.[38] * * *

Verdict for the plaintiff—Damages £20.

DODD v. KYFFIN.

(Court of King's Bench, 1797. 7 Durn. & E. 354.)

Trespass for breaking and entering the plaintiff's close called the Chapelfield, on the 30th March, 1793. Plea, the general issue. At the trial before the Chief Justice of Chester the plaintiff gave evidence of his being in possession of the close at the time of the trespass alleged, by proof of different acts of husbandry exercised by him therein down to that period and afterwards. It appeared that the close belonged to a chapel, of which Mr. Evans had been minister for some years, till his death in December, 1792, during which time it was held under him by one G. Dodd. Before the day of the alleged trespass, Mr. Price had succeeded as minister of the chapel; and the defend-

[38] Hussey v. King, 83 Me. 568, 571, 22 Atl. 476 (1891) semble; Wright v. Stephanus, 2 Tyler (Vt.) 80 (1802) semble. Accord.

ant offered to call a witness to prove, that previous to that day, Price had verbally demised the close to him, the defendant. The Chief Justice said he would receive any evidence to shew the actual possession out of the plaintiff at the time of the supposed trespass, but he thought that under the plea of not guilty he could not receive any evidence of title or of the right of possession being in the defendant; nothing being in issue but the fact of the trespass on the actual possession of the plaintiff. Some evidence was afterwards given to shew a possession in Price at that time; and the Chief Justice left the whole to the jury to find their verdict according as they believed that the possession was in or out of the plaintiff at that time; and they found a verdict for the plaintiff.

Manley in the last term obtained a rule to shew cause why the verdict should not be set aside, because the evidence offered had been rejected; and also because, admitting the possession to be dubious, trespass would not lie.

Leycester and Hinchliffe now shewed cause against the rule, and contended that the title could not be given in evidence on the general issue in trespass, but if meant to be insisted on it ought to have been pleaded. They admitted that a lease from a third person might be given in evidence, to disprove the fact of the plaintiff's possession; but the evidence in question was not offered on that ground. They mentioned Dove v. Smith, 6 Mod. 153, where Holt, Ch. J., said "upon not guilty the defendant could not give any matter of right in evidence." Bull. Ni. Pri. 90, and Bartholomew v. Ireland, Andr. 108, in which latter they observed there was a plea of liberum tenementum, and consequently what was said as to giving such evidence on the general issue, was extrajudicial. But

THE COURT were clearly of opinion that the defendant ought to have been permitted to give evidence of title and of right to possession under the general issue; and therefore they made the

Rule absolute.[39]

[39] Finch v. Alston, 2 Stew. & P. (Ala.) 83, 23 Am. Dec. 299 (1832) semble; White v. Naerup, 57 Ill. App. 114, 118 (1894); Rawson v. Morse, 4 Pick. (Mass.) 127 (1826); Fuller v. Rounceville, 29 N. H. 554 (1854); U. S. Pipe Line Co. v. Railroad Co., 62 N. J. Law, 254, 272, 41 Atl. 759, 42 L. R. A. 572 (1898); Saunders v. Wilson, 15 Wend. (N. Y.) 338 (1836) semble; Jones v. Muldrow, 1 Rice (S. C.) 64, 72 (1838); Dickinson v. Mankin, 61 W. Va. 429, 434, 56 S. E. 824 (1906). Accord. Manchester v. Vale, 1 Saund. 27 (1666) semble; Harris v. Miner, 28 Ill. 135 (1862) semble; Stone v. Hubbard, 17 Pick. (Mass.) 217 (1835); Ostrom v. Potter, 104 Mich. 115, 62 N. W. 170 (1895); Sayles v. Mitchell, 22 R. I. 238, 47 Atl. 320 (1900). Contra. For further citations see 21 Pl. & Pr. 834, 835.

The possession of the plaintiff is denied by not guilty. Holler v. Bush, 1 Salk. 394 (1697); Ebersol v. Trainor, 81 Ill. App. 645 (1898); Alliance Co. v. Nettleton Co., 74 Miss. 584, 593, 21 South. 396, 36 L. R. A. 155, 60 Am. St. Rep. 531 (1896); Underwood v. Campbell, 13 Wend. (N. Y.) 78 (1834).

FISHER v. MORRIS.

(Supreme Court of Pennsylvania, 1839. 5 Whart. 358.)

This was an action of trespass quare clausum fregit, &c. brought in this court to December Term, 1838, by James C. Fisher against Samuel B. Morris.

The plaintiff declared for a trespass to his close, situate in the township of Moyamensing and county of Philadelphia; particularly describing it by courses and distances, metes and bounds, &c.

The defendant pleaded not guilty, and liberum tenementum.

The plaintiff joined issue on the first plea, and demurred specially to the second—assigning for causes of demurrer that the plea "amounts to the general issue, and tends to great and unnecessary prolixity of pleading; and also for that the said plea is argumentative in its nature, by reason of its affirming that the title to the close mentioned and described in the said declaration, is in the said defendant, whereas the said declaration avers the title to the said close to be in the plaintiff," &c.

SERGEANT, J. The action of trespass quare clausum fregit, is founded on possession. To sustain it, the plaintiff must show that he was in the possession in fact of the premises at the time the injuries complained of were committed. The possession is a sufficient prima facie title for the plaintiff. His declaration technically states it to be his close, without more—not saying whether it is his by title, or that he was seised in fee simple, or for life, or possessed of an estate for years, or vesturæ terræ, or other estate. In law, he who has the actual possession of land, has the right against all but such as can show a right of possession against him. He who has the complete right of possession, may enter on the soil. His superior right is, in a civil suit, a justification of such entry. If the entry and detainer are peaceable, it is so in all suits. If forcible, he is liable to a criminal proceeding.

The plea of liberum tenementum, in trespass quare clausum fregit, is the mode of setting up this right of possession, by way of justification for the entry and acts done. It confesses all that is contained in the narr., viz., that the plaintiff had the possession, and that the acts set forth were committed by the defendant, but avoids the complaint by alleging a right to enter, and do the acts complained of. It does not deny the allegations of the plaintiff. It does not put them in issue. It sets up a new and distinct ground of defence; and if issue be taken on it by the plaintiff, this plea alone would throw on the defendant the burden of proof: and the narr. would be taken for granted as admitted. This distinguishes the present case altogether from that of McBride v. Duncan, 1 Whart. 269, where the action was trespass against personal property, and the pleas put in issue the plaintiff's property, and the other allegations of the declaration, and were in the end no more

than saying that the defendants were not guilty, though in the body of the pleas they gave the reasons why they were not guilty; and to avoid the rule that prohibits pleading specially, what amounts to the general issue, and to take the case from the jury, the defendants used the device of giving colour by suggesting a bad title in the plaintiffs. Here nothing of the kind is done.

It is true it has been frequently decided that the defence set up by this plea may be given in evidence on the general issue of not guilty. Dodd v. Kyffin, 7 Term Rep. 354; Argent v. Durrant, 8 Term Rep. 403; Gilb. Ev. 258; 1 Leon. 301; Andrews, 108. But it does not follow that because it may be given in evidence under the general issue, it cannot be pleaded specially. In this respect it resembles the pleas of release, payment and others which are admissible on non assumpsit, but yet do not amount to non assumpsit, and may be specially pleaded. The practice has been in Pennsylvania. to plead this plea of liberum tenementum, usually with that of not guilty; not as the common bar, in order to compel a new assignment of the locus in quo, but as a substantive plea; and the English precedents furnish numerous instances of such pleas.

There are no doubt some difficulties attending this plea which are pointed out by Chief Justice Willes in Lambert v. Strother, Willes Rep. 218, such as that it is not a full bar to the action; for though the place in question be the plaintiff's freehold, the plaintiff may have a good cause of action, as if he hold by lease under the defendant; or even though he had no right at all, if he has been in quiet possession a great while, &c. But he concludes that these pleas have long obtained, and it would be too much to overrule them generally, though in some cases they ought not to be held good pleas. The learned editor of these reports, in a note mentions a case in which they have been decided not to be good; but that was a trespass for taking chattels, where the ground of the writ is different. There is no reported case of quare clausum fregit in which the plea of liberum tenementum has been overruled. It is constantly recognised in ancient and modern books of precedents and in the elementary treatises; and that it is traversable, is admitted in Lambert v. Strother.

Perhaps the meaning and operation of the plea have undergone some alteration by the lapse of time and the changes of the system of society. For Sir Wm. Blackstone says, that an estate of freehold, liberum tenementum, or frank-tenement, is defined by Britton to be "the possession of the soil by a freeman." And St. Germyn tells us, "that the possession of the land is called in the law of England the frank-tenement or freehold." Such estate therefore as requires actual possession of the land, is, legally speaking, freehold, &c. 2 Bl. Com. 104. In this sense, the plea sets up possession as well as title. But the word freehold is now applied to the quantity of the estate; and the operation of the plea has been modified accordingly. For says Stephen in his Treatise on Pleading, 335, this allegation of a general freehold title, will be sus-

tained by proof of any estate of freehold, whether in fee, in tail, or for life only, and whether in possession or expectant on the determination of a term of years. But it does not apply to the case of a freehold estate in remainder or reversion expectant on a particular estate of freehold nor to copyhold tenure. And he cites 5 Hen. VII, 10a, pl. 2, which shows that where there is a lease for years it must be replied in confession and avoidance, and is no ground for traversing the plea of liberum tenementum.

Without however, pursuing an inquiry, now more a matter of curiosity than of use, it is sufficient to say, that long and established practice has recognised the plea; and the reason of it appears to be equally applicable, whether the close is specially or generally described in the plaintiff's narr., or designated in a novel assignment.

Demurrer overruled.[40]

BROWN et al. v. ARTCHER & VAN LIET.

(Supreme Court of New York, 1841. 1 Hill, 266.)

Demurrer to pleas. The declaration was for trespass de bonis, &c. and contained two counts, both of which alleged the taking by the defendants of certain goods, &c. the property of the said plaintiffs.

The defendants pleaded separately: 1. The general issue; 2. Proceedings against one Corl, a resident of the city of Detroit, in the state of Michigan, as an absent debtor, at the suit of the defendant Van Liet, and one Hart; and that Artcher, under an attachment issued therein, seized the goods as sheriff of Albany. These pleas averred respectively, that the goods belonged to Corl. They also interposed a third plea, not materially different from the second.

The plaintiffs demurred to the special pleas, assigning for cause, among other things, that they amounted to the general issue; and the defendants joined in demurrer.

By the court, COWEN, J. It was held in the Year Book, 27 H. VIII, 21, case 11, that, in trespass de bonis, a plea that the goods were not the plaintiff's property was bad. The same thing was afterwards admitted in Wildman v. Norton, (1 Ventr. 249; 2 Lev. 92, S. C. nom. Wildman v. North). I believe it has never been denied. Chitty says that "the defendant cannot plead property in a stranger or himself, because that goes to contradict the evidence which the plaintiff must adduce on the general issue in support of his case." (1 Chit. Plead. 527, Am. Ed. of 1840.) The usual test of an objection that the plea amounts to the general issue is, whether it takes away all

[40] Lodge v. Klein, 115 Ill. 177, 3 N. E. 272, 56 Am. Rep. 133 (1885); Ill. Central R. R. v. Hatter, 207 Ill. 88, 69 N. E. 751 (1904); Phillips v. Kent, 23 N. J. Law, 155 (1851) semble; Millet v. Singleton, 1 Nott & McC. (S. C.) 355 (1818). Accord. See, also, 21 Pl. & Pr. 839–841.

color for maintaining an action, by fixing a negative upon the plaintiff's right in the first instance. Thus, in trespass quare clausum fregit, the defendant pleading title in a third person, a demise to himself and an entry under that demise, this plea was held bad, because it shewed a right of possession in the defendant at the time when he entered and committed the trespass complained of. (Collett v. Flinn, 5 Cow. 466.) So, a plea that he entered under a licence from such a third person. (Underwood v. Campbell, 13 Wend. 78.) Such a plea standing alone, virtually says, that the defendant did not commit any trespass in the plaintiff's close; and is, therefore, but another mode of pleading not guilty. It absolutely and necessarily denies all possessory right in the plaintiff, the contrary of which he must maintain, or he is not entitled to sue. Such a plea is said, by the books, in itself to take away all color or pretence for an action; and therefore, to be maintainable as a special plea, it must surmise some possession in the plaintiff, at the time, under color of a defective title. Taking away, in itself, all implied color, it must, in the same manner mentioned, substitute what is called express color. (1 Chit Plead. 529, Am. Ed. of 1840; 5 Cow. 167, 168, note.)

The same rule of pleading has been applied to trespass de bonis. (1 Chit. Plead. 530, Am. Ed. of 1840; Leyfield's Case, 10 Rep. 90.) Chitty says, a plea that A. was possessed of the goods in question as of his own proper goods, amounts to a denial that the plaintiff had any property in them, and therefore gives no color of action in itself. To remedy this defect, it must surmise that the defendant bailed the goods to a stranger, who delivered them to the plaintiff, from whom the defendant took them; or, a possession of the plaintiff under some other defective title. (Vid. Fletcher v. Marillier, 9 Adolph. & Ellis, 457.) It is peculiar to the action of trespass, that the defendant may surmise such possession, setting up a mere fiction, not traversable, and thus turn what would otherwise be defective as amounting to the general issue, into a special plea. (1 Chit. Plead. 530, Ed. before cited.)

But if such express color be not given, the plea of property in a stranger, or the defendant, is emphatically defective, in the case of trespass de bonis; for there, especially, no actual possession being expressly shown in the plaintiff, the law intends that it is with the general owner. Accordingly, the common count alleges merely that the things taken were the goods of the plaintiff, without otherwise showing possession. (2 Chit. Pl. 859, Am. Ed. of 1840.)

In the case at bar, all the pleas demurred to aver that the goods in question were the goods of Corl; each following out the averment with the allegation that the goods were therefore taken by an attachment against Corl. According to the books cited, had the pleas stopped with the averment of property in Corl, giving as they do, no express color, they would have been bad as amounting to the general issue. Such an averment alone would have cut off all implied color; for it

would be saying, they were not the plaintiff's goods, in manner and form as he has alleged in declaring.

This being so, the farther allegations, showing a lawful authority under the attachment to take them as the goods of Corl, certainly cannot help the pleas. To this, Hallet v. Birt, (12 Mod. 120,) cited by the plaintiff's counsel on the argument, is, as he supposed, in point against the defendant. The plea there was, that the plaintiff had taken and impounded property belonging to A., at whose suit the defendant, under a warrant directed to him, replevied the property. This was held bad; though the court agreed that if the plea had said, the plaintiff took and detained the property, and so it had been taken by the defendant from the plaintiff's possession, it might have been well enough. That is probably one mode of giving express color.

It was supposed by the defendant's counsel, on the argument, that the pleas, by not expressly denying the plaintiff's possession, confessed it, and so there is implied color; whereas it is expressly said, in Wildman v. North, (2 Lev. 92,) that a plea of property in a stranger, with a traverse that the goods belonged to the plaintiff, in trespass amounts to the general issue, though not in replevin. And it is on the authority of this case, among others, that Chitty says, the simple plea of property in a stranger would be bad in trespass. Stephen on Pleading, 179, (Am. Ed. of 1824,) says, the general issue is applicable, if the defendant did take the goods, but they did not belong to the plaintiff. And it is said in Bacon's Abridgment, (tit. Pleas & Pleading, G, pl. 3, p. 372, Am. Ed. of 1813,) that if, in trespass, the defendant plead property in a stranger or himself, it amounts to the general issue, (Gould's Plead. pt. 2, ch. 6, par. 78, p. 345, 1st Ed. S. P.) Such uniform language cannot be accounted for, unless, as I have already supposed, the allegation of property in a third person involves a denial of the plaintiff's possession.

The objection we have thus examined, applies to all the pleas, and we are of opinion it is well taken.

It is not necessary to say, whether there be any foundation for the other objections of form specified by the demurrers.

Judgment for plaintiffs.[41]

[41] A plea alleging title in the defendant or in a third party under whom the defendant acted is bad. Jacques' Case, Style, 355 (1652); Argent v. Durrant, 7 D. & E. 403, 406 (1799) semble; Miller v. Miller, 41 Md. 623 (1874); Collet v. Flinn, 5 Cow. (N. Y.) 466 (1826); Merritt v. Miller, 13 Vt. 416 (1841) semble. Accord. Hatton v. Morse, 3 Salk. 273 (1702) semble; Gerrish v. Train, 3 Pick. (Mass.) 126 (1825) semble. Contra.

If express color be given the plea is good. Paramour v. Johnston, 12 Mod. 376 (1700) semble; Van Etten v. Hurst, 6 Hill (N. Y.) 311, 41 Am. Dec. 748 (1844). For discussions of color, see 1 Chitty (13th Am. Ed.) 525–532; Stephen, Pleading (Tyler's Ed.) 206–215.

OLSEN v. UPSAHL.

(Supreme Court of Illinois, 1873. 69 Ill. 273.)

Mr. Justice CRAIG [42] delivered the opinion of the Court:

This was an action of trespass quare clausum fregit, brought in the circuit court of Cook county by Anna M. Upsahl against Martine Olsen, to recover for breaking and entering her dwelling house.

The only plea filed by defendant was the general issue. At the March term, 1873, of the court, the cause was tried before a jury, the trial resulting in a verdict for plaintiff for $300. The defendant appealed.

The facts in this case, as shown by the record, are these: The plaintiff was a tenant of defendant. Suit was instituted by the defendant against the plaintiff to recover possession of the leased property, before a justice of the peace. The plaintiff, being a Norwegian, and not understanding the English language, did not understand the nature of the summons, and did not understand where the trial was to be held. The result was, judgment was obtained against her, and a writ of restitution issued and placed in the hands of a constable. The constable went to execute the writ, and found the door locked. He then went to the defendant for instructions. She went with him to the house and directed him to break open the door and carry out the goods, which he did. * * *

The defendant claims the court erred in refusing to give her 4th and 7th instructions. The 4th is as follows:

"The jury are instructed that, if they believe, from the evidence, that the acts complained of as trespass in this case were the acts of an officer pursuing the authority of a writ of restitution, in evidence in this case, and that the said officer committed the acts complained of in pursuing the authority of such writ of restitution, then they cannot find said defendant guilty, even though they may believe, from the evidence, she was present when said writ was executed by such officer."

The 7th instruction is similar to the 4th, at least the same question is involved in each.

These instructions were properly refused, for the reason that the defendant could not justify under the writ without pleading it. The only plea on file was, not guilty, and the only issue under that plea, before the jury, was the defendant guilty of trespass?

We understand the rule to be well settled, in actions of tort, matters in discharge or justification of the action must be specially pleaded. Hahn v. Ritter, 12 Ill. 83.

Had the defendant desired to justify under the writ, that issue should have been tendered by a special plea, but she saw proper not

[42] Part of opinion omitted.

to take that course, but to rely entirely on denying the trespass, and with that she must now be content.

Perceiving no error in the record, the judgment will be affirmed.

Judgment affirmed.[43]

FINCH'S EX'RS v. ALSTON.

(Supreme Court of Alabama, 1832. 2 Stew. & P. 83, 23 Am. Dec. 299.)

TAYLOR, J.[44] This is an action of trespass quare clausum fregit, brought by the defendant in error, against the decedent, in his lifetime, in the County Court of Marengo, and which, after suggestion of the death of the decedent in this court, has been revived against his representatives.

In the court below the general issue was pleaded, a trial had thereon, and a verdict and judgment were rendered in favor of the original plaintiff.

The assignments of error all grow out of the bill of exceptions; which will be considered in their order.

1st. The first assignment is, that "the court below refused to admit evidence offered by the defendant to prove that the houses were removed with the knowledge and consent of the plaintiff, and under an acknowledgment on his part that they were the property of the defendant."

The part of the bill of exceptions, to which this assignment relates, is in the following words:

"The defendant offered to prove that a parol contract had been entered into between the parties, by which the plaintiff agreed to sell, and the defendant to purchase, the land described in the declaration, for a stipulated price; that before the consummation of the contract, the plaintiff sold to another person; and that after the time of making the contract and before the sale of the land by the plaintiff to the third person a conversation took place between the parties, in which the defendant expressed a wish to remove the log houses, which form the subject of the present suit, and that the plaintiff acknowledged the houses to be the property of the defendant, and gave his consent and approbation to the removal of the same, in consequence of the parol agreement of the said land, and that they were removed in pursuance of the acknowledgment thus made." This testimony was rejected by the court.

[43] Leonard v. Stacy, 6 Mod. 69 (1704); Coe v. English, 6 Houst. (Del.) 456 (1881); McNall v. Vehon, 22 Ill. 499 (1859) semble; Rosenbury v. Angell, 6 Mich. 508 (1859) semble; Demick v. Chapman, 11 Johns. (N. Y.) 132 (1814). Accord. Neale v. Clautice, 7 Har. & J. (Md.) 372 (1826) semble; Gerrish v. Train, 3 Pick. (Mass.) 125 (1825); Wilcox v. Sherwin, 1 D. Chip. (Vt.) 72 (1797: where defendant an officer); Child v. Allen, 33 Vt. 476, 480 (1860). Contra.

[44] Statement of facts and part of the opinion omitted.

The question is, was this competent testimony under the general issue?

This proof was offered, not to mitigate the damages, but as a defence to the action: for it is obvious, that if it appeared to the jury that the plaintiff had authorised the houses to be removed, they could have rendered no verdict in his favor. The evidence, in fact, would have amounted to a justification.

It was not contended in argument, that the parol contract gave to the defendant any title to the land, or a right to enter upon it. That agreement was admitted to be a void one under the statute of frauds, but it was contended that the authority given by the plaintiff to the defendant, which it was wished to prove, virtually put the defendant into the possession of the land; and that he had a right to prove that possession under the general issue. It is most true that in an action of this kind, the defendant is authorised, under the general issue, to prove possession or title in himself, because without possession, the plaintiff cannot sue. But to consider the defendant constructively in possession, while the plaintiff was actually so, would be drawing an inference which no state of the case could warrant. We cannot view the defendant as in possession, and must determine whether the consent of the plaintiff to his entering upon the land and moving the houses, would afford him an excuse for doing so, as the pleadings stood.

In 1 Chitty's Pleadings, 492, we are informed that "in trespass whether to the person, personal or real property, the defendant may, under the general issue, give in evidence any matter which directly controverts the truth of any allegations, which the plaintiff on such general issue, will be bound to prove, and no person is bound to justify, who is not, prima facie, a trespasser. But where the act would, at common law, prima facie, appear to be a trespass, any matter of justification or excuse, or done by virtue of a warrant or authority, must, in general, be specially pleaded: and therefore, even where the defendant did the act at the request of the plaintiff, or where the injury was occasioned by the plaintiff's own default, these matters of defence must be specially pleaded." And in 2 Campbell, 378, 379, the same doctrine is laid down by Lord Ellenborough, in the case of Milman v. Dolwell. That was an action of trespass for cutting the plaintiff's barges from their moorings in the river Thames, whereby they had been set adrift and injured. It appeared that at a time when there was a great quantity of ice in the Thames, the defendant took two barges of the plaintiff from the middle of the river, where they were moored, to the opposite shore, and that one of them was immediately after discovered to have a hole in its bottom; but there was no evidence to show how this had been occasioned. The defendant offered to prove that if he had not interfered, the barges would most probably have been destroyed, as they were in imminent danger from the ice; that he did what was most for the plaintiff's

advantage, and that he had been employed by the plaintiff generally, to take charge of the barges.

But Lord Ellenborough said: "These facts should have been specially pleaded. I cannot admit evidence of them under the plea of not guilty. The defendant allows that he intermeddled with goods, which were the property, and in the possession, of the plaintiff. By so doing he is presumed to be a trespasser; and if he has any matter of justification, he must put it upon the record. The plea of not guilty only denies the act done, and the plaintiff's title to the subject of the trespass."

It is useless to multiply the authorities: this might easily be done. The quotation from Chitty shews, that a trespass on real, and one on personal property, is governed by the same rules. The evidence was properly rejected. * * *

The judgment is affirmed.[45]

COMSTOCK v. ODERMAN.

(Appellate Court of Illinois, 1885. 18 Ill. App. 326.)

BAILEY, P. J.[46] This was an action of trespass, brought by Oderman, the appellee, against Comstock the appellant. The declaration contains four counts. The first count alleges the demise by the defendant to the plaintiff of a suite of rooms in a certain building known as 291 and 293 Wabash avenue, in the city of Chicago, the lease containing a covenant for quiet enjoyment, and also alleging that the defendant, during the term of the demise, with force and arms, broke and entered the demised premises, and by means of screws, levers, posts and pillars, raised said building from its foundations, thereby breaking and damaging the walls and ceilings, and rendering the premises unfit for the purpose for which they were demised to the plaintiff, to-wit, for the purpose of a dwelling for the plaintiff and his family. The second and third counts allege the breaking and entering of the demised premises by the defendant, with force and arms, and damaging the same in a certain manner in said counts respectively specified; and the fourth count charges the defendant with breaking and entering said premises, with force and arms, and evicting and expelling the plaintiff from the possession thereof. The defendant appeared and filed a plea of not guilty, and upon the issue thus formed, a trial was had before the court

[45] Bennett v. Alcott, 2 D. & E. 166 (1787); Chicago Co. v. Cove, 223 Ill. 58, 79 N. E. 108 (1906); Ruggles v. Lesure, 24 Pick. (Mass.) 187 (1837); Hetfield v. Railroad Co., 29 N. J. Law, 571 (1862). Accord.

The rule is the same in actions for trespass to personalty. Milman v. Dolwell, 2 Camp. 378 (1810); Hendrix v. Trapp, 2 Rich. Law (S. C.) 93 (1845); Child v. Allen, 33 Vt. 476, 480 (1860) semble.

[46] Part of the opinion omitted.

and a jury, resulting in a verdict and judgment in favor of the plaintiff for $150 damages.

The evidence tended to show that, during the term of the lease, and while the plaintiff was in possession of the portion of the building demised to him, consisting of a suite of rooms in the fourth story, the defendant employed certain men to enter said building, and by means of screws, blocks, etc., to raise up a portion of one side of the building, which had settled below its original position several inches, whereby the floors, walls and ceilings of the plaintiff's rooms were cracked and injured, the water pipes and water closets obstructed, and the plaintiff's premises rendered uncomfortable and dangerous as a dwelling place for himself and family.

The evidence also tended to show that said building, at the time of the execution of the lease, was, and up to the time the defendant made said entry continued to be, in an unsafe and dangerous condition, and that said entry and acts done by the defendant and his employés, were for the purpose of making necessary repairs, so as to render the building reasonably safe for the persons and property of the occupants. It is claimed that these facts justified the entry, and that the court and jury wrongfully ignored the defense thereby established.

A plea of not guilty in trespass operates merely as a denial that the defendant committed the trespass complained of, but matters in justification must be specially pleaded. 1 Chitty on Plead. 534; Olsen v. Upsahl, 69 Ill. 273; Harris v. Miner, 28 Ill. 135; Hahn v. Ritter, 12 Ill. 80. It was therefore the duty of the court and jury to disallow the justification of the trespass, which the defendant now seeks to make out from the evidence, and they were at liberty to consider the evidence bearing upon the defense only so far as it might tend to mitigate the defendant's damages.

The defendant asked several instructions to the jury which were refused. We think they were properly refused. Most of them were based upon the assumed defense of justification which was not pleaded, and none of them, in our opinion, stated with accuracy any rule of law applicable to the case as it was presented to the jury upon the pleadings and proofs. There being no error in the record, the judgment will be affirmed.

Judgment affirmed.[47]

[47] In the following cases it is held that various other excuses must be pleaded in confession and avoidance: Hawkins v. Wallis, 2 Wilson, 173 (1763: easement); Watson v. Christie, 2 B. & P. 223 (1800: discipline); Knapp v. Salsbury, 2 Camp. 500 (1810: contributory negligence); Clark v. Railway (C. C.) 69 Fed. 543 (1895: Vermont law: contributory negligence); Illinois Co. v. Novak, 184 Ill. 501 (1900: defense of property); Strout v. Berry, 7 Mass. 385 (1811: easement); Sampson v. Henry, 11 Pick. (Mass.) 379, 387 (1831: recaption of property); Snow v. Chatfield, 11 Gray (Mass.) 12 (1858: authority under highway commissioners); Stow v. Scribner, 6 N. H. 24 (1832: self-defense); State v. Morgan, 25 N. C. 186, 38 Am. Dec. 714 (1842: defense of property); Saunders v. Wilson, 15 Wend. (N. Y.) 338 (1836: easement). See, also, 21 Pl. & Pr. 837.

BELLOWS et al. v. BUTLER.

(Supreme Court of Michigan, 1901. 127 Mich. 100, 86 N. W. 533.)

Error to circuit court, Benzie county; Clyde C. Chittenden, Judge.

Action by Elwin Bellows and another against Digby B. Butler. From a judgment in favor of defendant, plaintiffs bring error. Reversed.

LONG, J.[48] * * * 2. The plea was the general issue, and it is contended by counsel for plaintiffs that the defendant could not claim the benefit of the statute of limitations unless the same was pleaded. Section 9729, Comp. Laws 1897, provides: "All actions for trespass upon lands or for assault and battery or for false imprisonment, and all actions for slanderous words and for libels shall be commenced within two years next after the cause of action shall accrue, and not afterwards." This statute could be taken advantage of only by plea. Shank v. Woodworth, 111 Mich. 642, 70 N. W. 140; Whitworth v. Pelton, 81 Mich. 101, 45 N. W. 500.

For these errors, the judgment must be reversed, and a new trial ordered. The other justices concurred.[49]

[48] Part of the opinion omitted.

[49] Matters in discharge must be pleaded in confession and avoidance: Doe v. Lee, 4 Taunt. 459 (1812: accord and satisfaction); Hubbert v. Collier, 6 Ala. 269 (1844: arbitration and award); Phillips v. Kelly, 29 Ala. 628, 635 (1857: accord and satisfaction); Kenyon v. Sutherland, 8 Ill. 99, 102 (1846: accord and satisfaction); Hahn v. Ritter, 12 Ill. 80 (1850: former recovery); Noyes v. Edgerly, 71 N. H. 500, 53 Atl. 311 (1902: loss of cause of action by election of remedies); Longstreet v. Ketcham, 1 N. J. Law, 170 (1793: accord and satisfaction) semble; Coles v. Carter, 6 Cow. (N. Y.) 691 (1827: former recovery).

CHAPTER II

EJECTMENT

SECTION 1.—INTRODUCTION

DISPOSSESSION, OR OUSTER, OF CHATTELS REAL.

(3 Blackstone's Comm. [Christian's Ed.] c. 11, p. 199.)

A writ then of ejectione firmæ, or action of trespass in ejectment, lieth where lands or tenements are let for a term of years: and afterwards the lessor, reversioner, remainder-man, or any stranger, doth eject or oust the lessee of his term. In this case he shall have his writ of ejection to call the defendant to answer for entering on the lands so demised to the plaintiff for a term that is not yet expired, and ejecting him. And by this writ the plaintiff shall recover back his term, or the remainder of it, with damages.

Since the disuse of real actions, this mixed proceeding is become the common method of trying the title to lands or tenements. It may not therefore be improper to delineate, with some degree of minuteness, its history, the manner of its process, and the principles whereon it is grounded.

We have before seen, that the writ of covenant, for breach of the contract contained in the lease for years, was anciently the only specific remedy for recovering against the lessor a term from which he had ejected his lessee, together with damages for the ouster. But if the lessee was ejected by a stranger, claiming under a title superior to that of the lessor, or by a grantee of the reversion, (who might at any time by a common recovery have destroyed the term,) though the lessee might still retain an action of covenant against the lessor, for non-performance of his contract or lease, yet he could not by any means recover the term itself. If the ouster was committed by a mere stranger, without any title to the land, the lessor might indeed by a real action recover possession of the freehold, but the lessee had no other remedy against the ejector but in damages, by a writ of ejectione firmæ, for the trespass committed in ejecting him from his farm. But afterwards, when the courts of equity began to oblige the ejector to make a specific restitution of the land to the party immediately injured, the courts of law also adopted the same method of doing complete justice; and, in the prosecution of a writ of ejectment, introduced a species of remedy not warranted by the original writ nor prayed by the declaration,

(which are calculated for damages merely, and are silent as to any restitution,) viz. a judgment to recover the term, and a writ of possession thereupon. This method seems to have been settled as early as the reign of Edward IV: though it hath been said to have first begun under Henry VII, because it was probably then first applied to its present principal use, that of trying the title to the land.

The better to apprehend the contrivance, whereby this end is effected, we must recollect that the remedy by ejectment is in its original an action brought by one who hath a lease for years, to repair the injury done him by dispossession. In order therefore to convert it into a method of trying titles to the freehold, it is first necessary that the claimant do take possession of the lands, to empower him to constitute a lessee for years, that may be capable of receiving this injury of dispossession. For it would be an offence, called in our law maintenance, (of which in the next book) to convey a title to another, when the grantor is not in possession of the land: and indeed it was doubted at first, whether this occasional possession, taken merely for the purpose of conveying the title, excused the lessor from the legal guilt of maintenance. When therefore a person, who hath right of entry into lands, detemines to acquire that possession, which is wrongfully withheld by the present tenant, he makes (as by law he may) a formal entry on the premises; and being so in the possession of the soil, he there, upon the land, seals and delivers a lease for years to some third person or lessee: and, having thus given him entry, leaves him in possession of the premises. This lessee is to stay upon the land, till the prior tenant, or he who had the previous possession, enters thereon afresh and ousts him; or till some other person (either by accident or by agreement beforehand) comes upon the land, and turns him out or ejects him. For this injury the lessee is entitled to his action of ejectment against the tenant, or this casual ejector, whichever it was that ousted him, to recover back his term and damages. But where this action is brought against such a casual ejector as is before mentioned, and not against the very tenant in possession, the court will not suffer the tenant to lose his possession without any opportunity to defend it. Wherefore it is a standing rule, that no plaintiff shall proceed in ejectment to recover lands against a casual ejector, without notice given to the tenant in possession, (if any there be,) and making him a defendant if he pleases. And, in order to maintain the action, the plaintiff must, in case of any defence, make out four points before the court; viz. title, lease, entry and ouster. First he must shew a good title in his lessor, which brings the matter of right entirely before the court; then, that the lessor, being seised or possessed by virtue of such title, did make him the lease for the present term; thirdly, that he, the lessee, or plaintiff, did enter or take possession in consequence of such lease; and then, lastly, that the defendant ousted or ejected him, whereupon he shall have judgment to recover his term and damages;

and shall, in consequence, have a writ of possession, which the sheriff is to execute by delivering him the undisturbed and peaceable possession of his term.

This is the regular method of bringing an action of ejectment, in which the title of the lessor comes collaterally and incidentally before the court, in order to shew the injury done to the lessee by this ouster. This method must be still continued in due form and strictness, save only as to the notice to the tenant, whenever the possession is vacant, or there is no actual occupant of the premises; and also in some other cases. But, as much trouble and formality were found to attend the actual making of the lease, entry, and ouster, a new and more easy method of trying titles by writ of ejectment, where there is any actual tenant or occupier of the premises in dispute, was invented somewhat more than a century ago, by the Lord Chief Justice Rolle, who then sat in the Court of Upper Bench; so called during the exile of King Charles the Second. This new method entirely depends upon a string of legal fictions: no actual lease is made, no actual entry by the plaintiff, no actual ouster by the defendant; but all are merely ideal, for the sole purpose of trying the title. To this end, in the proceedings a lease for a term of years is stated to have been made by him who claims title, to the plaintiff who brings the action, as by John Rogers to Richard Smith, which plaintiff ought to be some real person, and not merely an ideal fictitious one who hath no existence, as is frequently though unwarrantably practised: it is also stated that Smith the lessee entered; and that the defendant, William Stiles, who is called the casual ejector, ousted him; for which ouster he brings this action. As soon as this action is brought, and the complaint fully stated in the declaration, Stiles, the casual ejector, or defendant, sends a written notice to the tenant in possession of the lands, as George Saunders, informing him of the action brought by Richard Smith, and transmitting him a copy of the declaration: withal assuring him that he, Stiles the defendant, has no title at all to the premises, and shall make no defence; and therefore advising the tenant to appear in court and defend his own title: otherwise he, the casual ejector, will suffer judgment to be had against him; and thereby the actual tenant Saunders will inevitably be turned out of possession. On receipt of this friendly caution, if the tenant in possession does not within a limited time apply to the court to be admitted a defendant in the stead of Stiles, he is supposed to have no right at all; and, upon judgment being had against Stiles the casual ejector, Saunders the real tenant will be turned out of possession by the sheriff.

But, if the tenant in possession applies to be made a defendant, it is allowed him upon this condition; that he enter into a rule of court to confess, at the trial of the cause, three of the four requisites of the maintenance of the plaintiff's action; viz. the lease of Rogers the lessor, the entry of Smith the plaintiff, and his ouster by Saunders himself, now made the defendant instead of Stiles: which re-

quisites being wholly fictitious, should the defendant put the plaintiff to prove them, he must of course be nonsuited for want of evidence; but by such stipulated confession of lease, entry, and ouster, the trial will now stand upon the merits of the title only. This done, the declaration is altered by inserting the name of George Saunders instead of William Stiles, and the cause goes down to trial under the name of Smith, (the plaintiff,) on the demise of Rogers, (the lessor,) against Saunders, the new defendant. And therein the lessor of the plaintiff is bound to make out a clear title, otherwise his fictitious lessee cannot obtain judgment to have possession of the land for the term supposed to be granted. But, if the lessor makes out his title in a satisfactory manner, then judgment and a writ of possession shall go for Richard Smith the nominal plaintiff, who by this trial has proved the right of John Rogers his supposed lessor. Yet, to prevent fraudulent recoveries of the possession, by collusion with the tenant of the land, all tenants are obliged by statute 11 Geo. II, c. 19, on pain of forfeiting three years rent, to give notice to their landlords, when served with any declaration in ejectment: and any landlord may by leave of the court be made a co-defendant to the action, in case the tenant himself appears to it; or, if he makes default, though judgment must be then signed against the casual ejector, yet execution shall be stayed, in case the landlord applies to be made a defendant, and enters into the common rule; a right, which indeed the landlord had, long before the provision of this statute: in like manner as (previous to the statute of Westm. II, c. 3.) if in a real action the tenant of the freehold made default, the remainder-man or reversioner had a right to come in and defend the possession; lest, if judgment were had against the tenant, the estate of those behind should be turned to a naked right. But if the new defendants, whether landlord or tenant, or both, after entering into the common rule, fail to appear at the trial, and to confess lease, entry, and ouster, the plaintiff Smith must indeed be there nonsuited, for want of proving those requisites; but judgment will in the end be entered against the casual ejector Stiles; for the condition on which Saunders, or his landlord, was admitted as defendant is broken, and therefore the plaintiff is put again in the same situation as if he never had appeared at all; the consequence of which (we have seen) would have been, that judgment would have been entered for the plaintiff, and the sheriff, by virtue of a writ for that purpose, would have turned out Saunders, and delivered possession to Smith. The same process therefore as would have been had, provided no conditional rule had been ever made, must now be pursued as soon as the condition is broken.

The damages recovered in these actions, though formerly their only intent, are now usually (since the title has been considered as the principal question) very small and inadequate; amounting commonly to one shilling, or some other trivial sum. In order therefore to complete the remedy, when the possession has been long detained from him

that had the right to it, an action of trespass also lies, after a recovery in ejectment, to recover the mesne profits which the tenant in possession has wrongfully received. Which action may be brought in the name of either the nominal plaintiff in the ejectment, or his lessor, against the tenant in possession: whether he be made party to the ejectment, or suffers judgment to go by default. In this case the judgment in ejectment is conclusive evidence against the defendant, for all profits which have accrued since the date of the demise stated in the former declaration of the plaintiff; but if the plaintiff sues for any antecedent profits, the defendant may make a new defence.

Such is the modern way of obliquely bringing in question the title to lands and tenements, in order to try it in this collateral manner; a method which is now universally adopted in almost every case. It is founded on the same principle as the ancient writs of assize, being calculated to try the mere possessory title to an estate; and hath succeeded to those real actions, as being infinitely more convenient for attaining the end of justice: because the form of the proceeding being entirely fictitious, it is wholly in the power of the court to direct the application of that fiction, so as to prevent fraud and chicane, and eviscerate the very truth of the title. The writ of ejectment and its nominal parties (as was resolved by all the judges) are "judicially to be considered as the fictitious form of an action, really brought by the lessor of the plaintiff against the tenant in possession: invented, under the control and power of the court, for the advancement of justice in many respects; and to force the parties to go to trial on the merits, without being entangled in the nicety of pleadings on either side."

STATUTES ON EJECTMENT.

(Revised Statutes of New York, 1829. Chapter 5, tit. 1.)

Section 1. The action of ejectment is retained, and may be brought in the cases and the manner heretofore accustomed, subject to the provisions hereinafter contained.

Section 3. No person can recover in ejectment, unless he has at the time of commencing the action, a valid subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof, or of some share, interest or portion thereof, to be proved and established at the trial.[1]

Section 4. If the premises for which the action is brought, are actually occupied by any person, such actual occupant shall be named

[1] In this and the subsequent notes to these statutes no attempt is made to cite every similar statute. Nor does the citation of a statute imply that its terms are exactly the same as the one printed in the text. For statutes similar to this section see Illinois, Hurd's Rev. St. 1908, Eject. c. 45, § 4; Michigan, Comp. Laws 1897, § 10,949; Tennessee, Code 1896 (Supp. 1903) § 4970.

defendant in the declaration; if they are not so occupied, the action must be brought against some person exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein, at the commencement of the suit.[2]

Section 5. It shall be commenced by the service of a declaration, in which the names of the real claimants shall be inserted as plaintiffs, and all the provisions of law concerning lessors of a plaintiff, shall apply to such plaintiffs.

Section 6. The use of fictitious names of plaintiffs or defendants, and of the names of any other than the real claimants and the real defendants, and the statement of any lease or demise to the plaintiff, and of an ejectment by a casual or nominal ejector, are hereby abolished.[3]

Section 7. It shall be sufficient for the plaintiff to aver in his declaration, that on some day therein to be specified, and which shall be after his title accrued, he was possessed of the premises in question, describing them as herein after provided, and being so possessed thereof, that the defendant afterwards, on some day to be stated, entered into such premises, and that he unlawfully withholds from the plaintiff the possession thereof, to his damage, any nominal sum the plaintiff shall think proper to state.[4]

Section 10. If the action be brought for the recovery of dower, the declaration shall state that the plaintiff was possessed of the one undivided third part of the premises, as her reasonable dower as widow of her husband, naming him. In every other case, the plaintiff shall state whether he claims in fee, or whether he claims for his own life, or the life of another, or for a term of years, specifying such lives or duration of such term.[5]

Section 22. The defendant may demur to the declaration as in personal actions; or he shall plead the general issue only, which shall be that the defendant is not guilty of unlawfully withholding the premises claimed by the plaintiff, as alleged in the declaration; and the filing

[2] District of Columbia, Code of Laws 1901, c. 23, § 984; Hawaii, Rev. Laws 1905, § 1726; Illinois, Hurd's Rev. St. 1908, c. 45, §§ 6, 7; Michigan, Comp. Laws 1897, § 10,950; Mississippi, Code 1906, § 1803; New Jersey, 2 Gen. St. 1895, Eject. p. 1282, §§ 3, 4; Pennsylvania, Purdon's Digest 1903, Ejectment, § 9; Virginia, Code 1904, § 2726; West Virginia, Code 1906, § 3340.

[3] See the statutes collected in 7 Ency. Forms, 289.

[4] Alabama, Code 1907, § 3839; District of Columbia, Code of Laws 1901, c. 23, § 985; Illinois, Hurd's Rev. St. 1908, c. 45, § 11; Michigan, Comp. Laws 1897, § 10,953; Tennessee, Code 1896 (Supp. 1903) § 4975; Virginia, Code 1904, § 2728; West Virginia, Code 1906, § 3342.

In other states the statutes provide for still less cumbersome declarations. Florida, Gen. St. 1906, § 1968; Maine, Rev. St. 1883 (Supp. 1895) c. 104, § 2; Massachusetts, Rev. Laws 1902, c. 179, § 2; New Jersey, 2 Gen. St. 1895, Eject. p. 1283, § 10.

[5] Illinois, Hurd's St. 1908, c. 45, § 13; Maine, Rev. St. 1883 (Supp. 1895) c. 104, § 3; Massachusetts, Rev. Laws 1902, c. 179, § 2; Michigan, Comp Laws 1897, § 10,956; Tennessee, Code 1896 (Supp. 1903) § 4976; Virginia Code 1904, § 2730; West Virginia, Code 1906, § 3344.

and service of such plea or demurrer, shall be deemed an appearance in the cause. And upon such plea, the defendant may give the same matter in evidence, and the same proceedings shall be had, as upon the plea of not guilty in the present action of ejectment, except as herein otherwise provided.[6]

Section 24. The consent rule, heretofore used, is hereby abolished.

Section 26. It shall not be necessary on the trial, for the defendant to confess, nor for the plaintiff to prove, lease, entry and ouster, or either of them, except as provided in the next section; but this section shall not be construed to impair, nor in any way to affect, any of the rules of evidence now in force, in regard to the maintenance and defence of the action.

(Hurd's Revised Statutes of Illinois, 1908. Chapter 45.)

Section 18. The landlord, whose tenant is sued in ejectment, may, upon his own motion or that of the plaintiff, be made defendant in such action, upon such terms as may be ordered by the court.[7]

Section 21. The plea of not guilty shall not put in issue the possession of the premises by the defendant, or that he claims title or interest in the premises.[8]

Section 22. It shall not be necessary for the plaintiff to prove that the defendant was in possession of the premises, or claims title or interest therein at the time of bringing the suit, or that the plaintiff demanded the possession of the premises, unless the defendant shall deny that he was in such possession, or claims title or interest therein, or that demand of possession was made, by special plea, verified by affidavit.

[6] Michigan, Comp. Laws 1897, § 10,967; Virginia, Code 1904, § 2734; West Virginia, Code 1906, § 3348. In Pennsylvania, on the other hand, the defendant must by special plea set forth any defenses he intends to rely upon. Pennsylvania, Purdon's Digest 1903, Eject. § 21.

[7] Alabama, Code 1907, § 3844; Delaware, Rev. Code 1893, c. 119, § 2; District of Columbia, Code of Laws 1901, c. 23, § 984; Illinois, Hurd's Rev. St. 1908, c. 45, § 18; Mississippi, Code 1906, § 1805; New Jersey, 2 Gen. St. 1895, Eject. p. 1284, § 17; Pennsylvania, Purdon's Dig. 1903, Eject. § 3; Tennessee, Code 1896 (Supp. 1903) § 4973; Vermont, St. 1894, § 1487; Virginia, Code 1904, § 2726; West Virginia, Code 1906, § 3340.

[8] Alabama, Code 1907, § 3842; Florida, Gen. St. 1906, § 1968; Mississippi, Code 1906, §§ 1821, 1822; New Jersey, 2 Gen. St. 1895, Eject. p. 1284, § 13; Tennessee, Code 1896 (Supp. 1903) § 4981.

SECTION 2.—SCOPE OF THE ACTION

CASEY et al. v. KIMMEL.

(Supreme Court of Illinois, 1899. 181 Ill. 154, 54 N. E. 905.)

Appeal from circuit court, Peoria county; T. M. Shaw, Judge.

Action in ejectment by Charles A. Kimmel against Edwin A. Casey and others. From a judgment for plaintiff against defendants Edwin A. Casey and James B. Oglesby, they appeal. Affirmed.

Mr. Justice CARTER [9] delivered the opinion of the court. * * *

But it is contended that the court erred in directing a verdict for the plaintiff. The plaintiff's title was derived by mesne conveyances from Moses Stringer, who settled upon the quarter section containing the 10 acres in controversy in 1838, but, owing to a defect in the proof, the plaintiff was unable to connect him with the patent title. The evidence showed, however, that he lived upon and improved a part of the quarter section for many years, and tended to prove that he claimed to own it, but there was no evidence, specifically applicable to the tract in controversy, that Stringer improved it, claimed to own it, or exercised any acts of ownership over it, except that it was a part of the quarter section the south half of which he improved, and that he sold and conveyed it, having made the first conveyance in 1851 in the chain of title which ended in the plaintiff in 1890. Being unable to trace his title beyond Stringer, the plaintiff, to make a prima facie case, sought to prove: First, that when said Stringer conveyed this tract he was in possession, claiming to own it; second, that other intermediate grantors, when they conveyed, were in possession, claiming to own it; and, finally, that he entered into possession of the same property under his deed in 1890, and held possession of the same until appellants intruded and took possession, in 1895. If the plaintiff succeeded in proving either of the propositions mentioned, he thereby established a prima facie case, and was entitled to judgment, unless the presumption thus raised in his favor was overcome by the defendants. Anderson v. McCormick, 129 Ill. 308, 21 N. E. 803; Barger v. Hobbs, 67 Ill. 592; Doe v. Herbert, Breese, 354, 12 Am. Dec. 192; Mason v. Park, 3 Scam. 532; Keith v. Keith, 104 Ill. 397; De Witt v. Bradbury, 94 Ill. 446; Bowman v. Wettig, 39 Ill. 416; Bank v. Godfrey, 23 Ill. 579; Coombs v. Hertig, 162 Ill. 171, 44 N. E. 392; Harland v. Eastman, 119 Ill. 22, 8 N. E. 810. Appellants had no title whatever, but claimed that the land was vacant and unoccupied, had been abandoned, and that they were entitled to hold it against the plaintiff—First, because he had failed to prove title in himself; and, second, because they had

[9] Part of the opinion omitted.

proved title in fee in a third person. They did not claim under, nor connect themselves with, the title of such third person in any way. Being mere trespassers, and without title, appellants could not set up an outstanding title in another. Anderson v. Gray, 134 Ill. 550, 25 N. E. 843, 23 Am. St. Rep. 696. * * *

Judgment affirmed.[10]

[10] In Shaw v. Hill, 79 Mich. 86, 90, 44 N. W. 422, 423 (1889), the court said:

"The action of ejectment in this state is governed by the provisions of the statute relating to the action. Section 7790, How. Ann. St. provides that—'No person can recover in ejectment unless he has, at the time of commencing the action, a valid, subsisting interest in the premises claimed, and a right to recover the possession thereof, or of some share, interest, or portion thereof, to be proved and established at the trial.'

"It is evident that the 'valid, subsisting interest in the premises claimed' is something different from a right to recover possession of the premises, for the statute requires that each shall co-exist. The right of possession alone will not sustain the action. It was urged upon the argument that, the plaintiff's deed having been held to be void by the circuit judge, he could not maintain this action, based upon his naked possession, because he had no valid, subsisting interest in the premises. The law is well settled that the possession of land is sufficient to authorize a recovery in an action of ejectment against a mere intruder; and, in the absence of proof of a paper title on either side, the presumption of title is in favor of the first possessor. Davis v. Easley, 13 Ill. 192; Brooks v. Bruin, 18 Ill. 541; Hubbard v. Little, 9 Cush. (Mass.) 475; Jones v. Easley, 53 Ga. 454; Christy v. Scott, 14 How. 282, 14 L. Ed. 422; Burt v. Panjaud, 99 U. S. 180, 25 L. Ed. 451; Whitney v. Wright, 15 Wend. (N. Y.) 171; Thompson v. Burhans, 79 N. Y. 93; Kinney v. Harrett, 46 Mich. 87, 8 N. W. 708. The authorities might be greatly extended, but it is unnecessary.

"The presumption arising from proof of prior possession of a party, in an action of ejectment against a mere intruder, is that the party having such prior possession was seized in fee, and is prima facie evidence of such fact. Cole, Ej. 212, 213; Malone, Real Prop. Tr. 98; 2 Greenl. Ev. § 311. Actual possession of real estate under a claim of ownership, is an element of title; and, if continued a sufficient length of time, openly, adversely, and continuously, will ripen into a complete legal title.

"In view of the above well-recognized principles, I do not think it was the intention of the Legislature to deprive a party who has been ousted from possession by a mere intruder from maintaining his action of ejectment. As against such a person, the party first in possession, claiming title, has a valid, subsisting interest, amounting to a prima facie title in fee. Bates v. Campbell, 25 Wis. 613."

Possession is sufficient. Read v. Essington, Cro. Eliz. 321 (1591); Allen v. Rivington, 2 Saund. 110 (1670); Doe v. Dyeball, Moody & M. 346 (1829); Hubbard v. Little, 9 Cush. (Mass.) 475 (1852); Den v. Sinnickson, 9 N. J. Law, 149 (1827); Smith v. Lorillard, 10 Johns. (N. Y.) 338, 354 (1813); Turner v. Reynolds, 23 Pa. 199, 205 (1854). Accord. For many more citations see 1 Chitty, Pleading (16th Am. Ed.) *212; 15 Cyc. 30; 10 Am. & Eng. Ency. 486.

No doubt it is immaterial that the plaintiff's possession was wrongful as against third parties. See Asher v. Whitlock, L. R. 1 Q. B. 1 (1865); Slater v. Rawson, 6 Metc. (Mass.) 439, 444 (1843) semble; Hubbard v. Little, 9 Cush. (Mass.) 475 (1852) semble; Hoey v. Furman, 1 Pa. 295, 299, 44 Am. Dec. 129 (1845) semble.

Right to possession is sufficient. Doe v. Calvert, 2 East, 376 (1802); Jackson v. Schoonmaker, 4 Johns. (N. Y.) 390 (1809). See, also, 15 Cyc. 33, 39; 10 Am. & Eng. Ency. 484.

An owner without possession or right to possession cannot recover. Right v. Beard, 13 East, 210 (1811); Scisson v. McLaws, 12 Ga. 166 (1852) semble, Herrell v. Sizeland, 81 Ill. 457 (1876); Wilson v. Inloes, 11 Gill & J. (Md.)

SMITH v. LORILLARD.

(Supreme Court of New York, 1813. 10 Johns. 338.)

This was an action of ejectment, brought to recover possession of a lot of ground in Chamber street, in the 6th ward of the city of New York. The cause was tried before Mr. Justice Van Ness, at the New York sittings, on the 12th December, 1811.[11]

KENT, C. J. delivered the opinion of the court. The most important point in this case is, whether the lessors of the plaintiff showed sufficient evidence of title to authorize a recovery.

They showed that in May, 1768, J. Teller, their ancestor, entered into possession of a house which he had built two or three years before on the negroes' burying-ground, and which had, previously to his entrance, been occupied by his tenant. That he had a fence enclosing the burying-ground, and claimed it as his property, and pastured it, and kept the key of the gate leading to the ground, and took payment for the use of the ground, and that it was known and called by the name of his land and fence. That he continued in possession until his death in June, 1775, and his family continued in possession afterwards, and until the commencement of the troubles, (as one of the witnesses expressed it,) and which undoubtedly alluded to the invasion of New York, in 1776; and that then the family left the city and retired into the country, and the British army took possession of the house and lot, and during the course of the war, and while under the dominion of the British, the house and fences were destroyed. That the premises claimed are a part of the burying-ground so possessed by J. Teller, and except the occupation by the British troops, no possession adverse to the claim of the lessors took place, as to the land now demanded, until the year 1795.

These facts were, upon the trial, declared to be sufficient to warrant a recovery. They are prima facie evidence of right and it is not necessary that the plaintiff in ejectment should, in every case, show a possession of twenty years, or a paper title. A possession for a less period will form a presumption of title sufficient to put the defendant upon his defence. This was intimated by the court in respect to this very claim, in the case of Smith v. Burtis & Woodward, 6 Johns. 218, 5 Am. Dec. 218, and a recovery was permitted in that case upon the same presumptive evidence of right. 9 Johns. 174. A prior possession short of twenty years, under a claim or

351, 358 (1840) semble. Accord. See, also, 15 Cyc. 50, 51; 10 Am. & Eng. Ency. 494, 495.

There is a little authority to the effect that possession is insufficient against one who enters under a bona fide, though groundless, claim of right. Riverside Co. v. Townshend, 120 Ill. 9, 20, 9 N. E. 65 (1886) semble; Shaw v. Hill, 83 Mich. 322, 42 N. W. 247, 21 Am. St. Rep. 607 (1890); Jackson v. Rightmyre, 16 Johns. (N. Y.) 314 (1819); Fowler v. Whiteman, 2 Ohio St. 271, 286 (1853).

[11] Statement of facts abridged.

assertion of right, will prevail over a subsequent possession of less than twenty years, when no other evidence of title appears on either side. There are many decisions of this court which look to this point. Jackson v. Hazen, 2 Johns. 22; Jackson v. Myers, 3 Johns. 388, 3 Am. Dec. 504; Jackson v. Harder, 4 Johns. 202, 4 Am. Dec. 262. It is, however, to be understood in the cases to which the rule of evidence applies, that the prior possession of the plaintiff had not been voluntarily relinquished without the animus revertendi, (as is frequently the case with possession taken by squatters,) and that the subsequent possession of the defendants was acquired by mere entry without any lawful right.

That the first possession should, in such cases, be the better evidence of right, seems to be the just and necessary inference of law. The ejectment is a possessory action, and possession is always presumption of right, and it stands good, until other and stronger evidence destroys that presumption. This presumption of right every possessor of land has, in the first instance, and after a continued possession for twenty years, under pretence or claim of right, the actual possession ripens into a right of possession which will toll an entry. But until the possession of the tenant has become so matured, it would seem to follow, that if the plaintiff shows a prior possession, and upon which the defendant entered without its having been formally abandoned, as derelict, the presumption which arose from the tenant's possession is transferred to the prior possession of the plaintiff, and the tenant, to recall that presumption, must show a still prior possession, and so the presumption may be removed from one side to the other, toties quoties, until one party or the other has shown a possession which cannot be overreached, or puts an end to the doctrine of presumptions founded on mere possession, by showing a regular legal title, or a right of possession.

It is stated in Jenkins (Cent. p. 42) that "the first possession, without any other title serves in an assize for land," and the assize, like the ejectment, was a possessory action. In Bateman v. Allen, Cro. Eliz. 437, it was ruled that the plaintiff was entitled to recover in ejectment, when it was found by special verdict, that the defendant had not the first possession, nor entered under title, but upon the plaintiff's possession. In Allen v. Rivington, 2 Saund. 111, the decision is still more strongly and pointedly in favor of the force in a prior possession. A special verdict was taken in ejectment, but Saunders adds, "that the matter of law was never argued, because it appeared upon the record that the lessor of the plaintiff had a priority of possession, and there was not any title found for the defendant. And then the priority of possession gives a good title to the lessor against the defendant, and it was adjudged for the plaintiff."

In the present case, there was a peculiar force attached to the prior possession on which the plaintiff relied. There was a descent

cast during its existence, and the infant heirs of the ancestor were driven from the actual possession by a public enemy, who destroyed the improvements on the property. According to the equity of the jus postliminii, the law revested the possession in the heirs on the removal of the hostile force. Ouster by the enemy ought not, of itself, to work, in legal contemplation, a discontinuance of possession. The possession was, by construction of law, in the heirs of J. Teller, until an actual adverse entry in 1795, upon that constructive possession.

This testimony being sufficient to entitle the plaintiff to recover, what did the defendants produce in opposition to it? They showed no prior possession, nor did they show a subsequent adverse possession of above fifteen years, nor did they show title in themselves. The effect of the evidence was to show a subsisting title out of the plaintiff; and if the deed of 1753, to Mary Van Vleeck, was not genuine, or, if genuine, if it did not cover the premises, (and this was the better conclusion,) the defendants did not succeed, unless it be as to two eighths of the premises, and for that portion of them the verdict was not taken.

The motion to set aside the verdict ought, therefore, to be denied

Motion denied.[12]

GOODRIGHT v. RICH & GOVETT.

(Court of King's Bench, 1797. 7 Durn. & E. 327.)

Ejectment for thirty acres of land, twenty acres of meadow and twenty acres of pasture, with the appurtenances, situate in the parishes of Over Stowey and Nether Stowey, in the county of Somerset. The defendants pleaded the general issue, and entered into the common consent rule as tenants. The cause was tried before Mr. Justice Buller, at Taunton, when a verdict was found for the plaintiff, subject to the opinion of this court on the following case. The lessor of the plaintiff proved his title to certain lands in the parishes mentioned in the declaration of ejectment, which lands were called Clutsome's, Dunscombe's, Landsey's Breach, Griddle's Breach, and the Gore Platt, which were the premises in question. The defendants proved that they were not, nor ever had been in the possession of any part of the premises in question. The only point reserved at the trial was, whether the defendants after entering into the conditional rule could be permitted to prove that they neither were or had been in possession of the premises, which the plaintiff by the evidence had entitled himself to. If such proof on the part of the defendants

[12] Newnam v. City, 18 Ohio, 323 (1849). Accord. Webb v. Phillips, 80 Fed. 954, 960, 26 C. C. A. 272 (1897: Ky. law) semble; Sowder v. Heirs, 4 Dana (Ky.) 456 (1836: possession immediately before wrongful entry enough but possession some time before insufficient). Contra.

were admissible, a nonsuit was to be entered; otherwise the verdict was to stand.[13]

Lord Kenyon, C. J. This has certainly been a vexata questio; when I went the circuit as counsel, the case in Buller's Ni. Pri., in which it was said "If there be but one defendant as tenant in possession, the plaintiff need not prove him in possession," was supposed to be law; and when a case afterward came on before me on the Home Circuit I ruled accordingly, not thinking it necessary to prove the defendant in possession. But I was never called on to consider the question accurately till now; and when we consider the reason of the thing, it seems wonderful that any question could seriously have arisen upon this subject. On the trial of an ejectment two parties come to litigate the title to an estate, the person claiming, and the person who is supposed to withhold improperly, the possession: but as soon as it turns out that the latter is not in possession, it seems to me that the cause is ill constituted between those two persons. The proceedings in ejectment were instituted in order to try who is entitled to the possession of an estate on title: when the declaration is delivered the lessor of the plaintiff claims in general terms so many acres of land, so many messuages, &c. which communicates but little intelligence to the person served with the declaration. If the latter happened to be in possession of any land falling within the description of the declaration, he must defend in order to preserve his own right; then it would be unjust that a verdict should be found against him though he can prove a title to every acre of land of the parish of which he was ever in possession; and yet this is the consequence of the plaintiff's argument. Two rules have been made by the two courts, differing indeed in words, and, as the plaintiff now contends, differing also in substance. In the Common Pleas the defendant enters into the consent rule as to all the lands in his possession: then on that rule it is necessary for the plaintiff to prove the defendant in possession of the land that he claims. But it is said that the meaning of the rule of this court is different: I should be extremely sorry to find that in a fictitious proceeding, instituted for the more easy attainment of justice, different rules were to obtain in the different courts. If we were bound to decide in this case in favour of the plaintiff, it would be necessary to alter the rule of our court immediately. This point however came under the consideration of the court in the case reported in Wilson,[14] where it was holden that the plaintiff must prove the defendant in possession; and I think that that case was properly decided. Then it was urged that two cases have been since determined at Nisi Prius[14] the other way: but they were only decisions at Nisi

[13] Arguments of counsel omitted.

[14] The case in Wilson is cited in the argument of counsel and is in 1 Wilson, 220. The nisi prius cases seem to have been unreported.

Prius, where perhaps the subject was not so well considered, and they cannot outweigh the authority of the case in Wilson. Therefore on the convenience and reason of the thing, and considering the question in every point of view, I am of opinion that the plaintiff must prove the defendant in possession of that which he seeks to take from him, and that the contrary practice that has obtained is wrong.[15]

PER CURIAM. Judgment of nonsuit.[16]

SECTION 3.—NECESSARY ALLEGATIONS

DECLARATION AND NOTICE IN EJECTMENT.

(2 Chitty, Pleading [13th Am. Ed.] p. *877.)

In the King's Bench, (or "Common Pleas.")

——— Term, ——— Will. 4.

——— (to wit.) Richard Roe was attached to answer John Doe of a plea, wherefore he the said Richard Roe, with force and arms, &c. entered into * * * ——— acres of arable land, * * * with the appurtenances, situate and being in the parish of ——— aforesaid, in the county of ——— aforesaid, with the common of pasture thereunto belonging and appertaining which A. B. had demised to the said John Doe for a term which is not yet expired, and ejected him from his said farm; and other wrongs to the said John Doe did, to the great damage of the said John Doe, and against the peace of our lord the now king, &c.—And thereupon the said John Doe, by E. F. his attorney, complains, that whereas

[15] The concurring opinions of Ashhurst, Grose, and Lawrence, JJ., are omitted.

[16] Smith v. Mann, 1 Wilson, 220 (1748); Fenn v. Wood, 1 B. & P. 573 (1796); Scisson v. McLaws, 12 Ga. 166 (1852) semble; Eastin v. Rucker, 1 J. J. Marsh. (Ky.) 232 (1829) semble; Wallis v. Doe, 2 Smedes & M. (Miss.) 220, 225 (1844); Pickett v. Doe, 5 Smedes & M. (Miss.) 470, 489, 43 Am. Dec. 523 (1845) semble; Smith v. Doe, 10 Smedes & M. (Miss.) 584 (1848) semble; Delaware, etc., R. R. v. Breckenridge, 55 N. J. Eq. 141, 145, 35 Atl. 756 (1896) semble; Cooper v. Smith, 9 Serg. & R. (Pa.) 26, 31, 11 Am. Dec. 658 (1822); McCanna v. Johnston, 19 Pa. 434 (1852); Evarts v. Dunton, Brayton (Vt.) 70 (1817); Cooley v. Penfield, 1 Vt. 244 (1828); Stevens v. Griffith, 3 Vt. 448, 455 (1831). Accord. McDaniels v. Reed, 17 Vt. 674, 678 (1845: without discussion or citations). Contra.

If the land were unoccupied the action could only be maintained by having a real lease, entry and ouster by a casual ejector and serving notice on the person claiming title. 2 Tidd, Practice (2d Am. Ed.) 1201.

And under the statutes similar to that of New York, given above at page 52, if the lands are unoccupied and the defendant claims title the action lies. Lockwood v. Drake, 1 Mich. 14 (1847).

Of course ejectment will not lie for anything but corporeal realty. It will not lie for easements. Smith v. Wiggin, 48 N. H. 105 (1868: leading case). See, also, 15 Cyc. 23, 24. No doubt it would not lie for chattels. Hill v. Hill, 43 Pa. 521 (1862).

the said A. B. on the ——— day of ———, in the ——— year of the reign our said lord the king, at the parish aforesaid, in the county aforesaid, had demised the said tenements, with the appurtenances, to the said John Doe, to have and to hold the same to the said John Doe, and his assigns, from thenceforth, (or from the ——— day of ———, in the ——— year aforesaid) for and during, and unto the full end and term of ———, from thence next ensuing, and fully to be completed and ended.—By virtue of which said demise, the said John Doe entered into the said tenements, with the appurtenances, and became and was thereof possessed for the said term, so to him thereof granted, as aforesaid.—And the said John Doe, being so thereof possessed, the said Richard Roe afterwards, to wit, on the day and year aforesaid (or, on the ——— day of ———, in the year aforesaid), with force and arms, &c. entered into the tenements with the appurtenances, in which the said John Doe was so interested, in manner, and for the term aforesaid, which is not yet expired and ejected him the said John Doe out of his said farm, and other wrongs to the said John Doe, and against the peace of our said lord the king; whereof the said John Doe saith that he is injured, and hath sustained damage to the value of £50., and therefore he brings his suit &c.

Mr. C. D. (the tenant or tenants in actual possession.)

I am informed that you are in possession of, or claim title to, the premises in this declaration of ejectment mentioned, or to some part thereof, and I, being sued in this action as casual ejector only, and having no claim or title to the same, do advise you to appear in next ——— Term, (or, if the premises lie in London or Middlesex, "on the first day of next ——— Term," in his majesty's Court of King's Bench, wheresoever, &c. (or, in the Common Pleas, "in his Majesty's Court of Common Bench at Westminster") by some attorney of that court, and then and there, by rule of the same court, to cause yourself to be made defendant in my stead, otherwise I shall suffer judgment therein to be entered against me by default, and you will be turned out of possession. Dated this ——— day of ———, A. D. ———.

Yours, &c. Richard Roe.

DECLARATION IN EJECTMENT.

(Puterbaugh, Common Law Pleading and Practice [8th Ed.] 432.)

In the ——— Circuit Court. ——— Term, 19—.

State of ———} sct.
County of ———}

A. B., plaintiff by E. F., his attorney, complains of C. D., defendant, of a plea of ejectment: For that the plaintiff, on the ———

day of ———, in the year 19—, was possessed of a certain parcel of land, with the appurtenances, lying in the county of ———, aforesaid, to wit, (here describe the land,) which said tenements the plaintiff claims in fee: And the plaintiff being so thereof possessed, the defendant afterwards, to wit, on, etc., entered into the said tenements, and now unlawfully withholds from the plaintiff the possession thereof; to the damage of the plaintiff of ——— dollars, and therefore he brings his suit, etc.

RAWSON v. TAYLOR.

(Supreme Court of Maine, 1869. 57 Me. 343.)

On report.

Real action for the recovery of the possession of certain land described in the writ, and for rent thereof. The writ set out an estate in fee in the plaintiff.

The plaintiff put in a judgment recorded in his own favor in March, 1864, against Sarah Brister, and a levy of the execution issued thereon upon the premises, the appraiser's certificate describing the estate set off as the "life-estate of Sarah Brister," "to hold to said creditor, his heirs and assigns, for and during the natural life of the said Sarah Brister."

APPLETON, C. J. The demandant by his levy on his execution against Sarah Brister obtained only an estate during her life.

By Rev. St. 1857, c. 104, § 3, the demandant is required to "set forth the estate he claims in the premises, whether in fee-simple, fee-tail, for life or for years; and if for life, then whether for her own life or that of another," &c. By section 8, if the demandant proves that he is entitled to such estate in the premises as he has alleged, and had a right of entry therein when he commenced his action, he shall recover the premises, unless the tenant proves a better title in himself.

In the declaration the demandant claims an estate in fee. His proof utterly fails to support it. The action cannot be sustained without an amendment. As none is asked for, the plaintiff must become nonsuit.

Plaintiff nonsuit.[17]

KENT, DICKERSON, BARROWS, DANFORTH, and TAPLEY, JJ., concurred.

[17] Almond v. Bonnell, 76 Ill. 536 (1875); Butrick v. Tilton, 141 Mass. 93, 6 N. E. 563 (1886) semble; Goodall v. Henkel, 60 Mich. 382, 27 N. W. 556 (1886: but see Olin v. Henderson, 120 Mich. 149, 155, 79 N. W. 178 [1899] holding plaintiff may prove possession under a contract to buy when his declaration alleges a fee in him); Dunn v. Sullivan, 23 R. I. 605, 51 Atl. 203 (1902); Royston v. Wear, 3 Head (Tenn.) 8 (1859) semble; Malony v. Adsit, 175 U. S. 281, 288, 20 Sup. Ct. 115, 44 L. Ed. 163 (1899) semble; Roach v. Blakey, 89 Va. 767, 17 S. E. 228 (1893) semble; Jarrett v. Stevens, 36 W. Va. 445, 15 S. E. 177 (1892). Accord.

BUSH v. GLOVER.

(Supreme Court of Alabama, 1872. 47 Ala. 167.)

PETERS, J.[18] This is a statutory action for the recovery of land, in the nature of action of ejectment. The suit is brought on a title derived from a sheriff's deed. The complaint was demurred to. The statement of the cause of action is in the following words: "The plaintiff sues to recover the following tracts of land: The north half of north-east quarter of section twenty-three, the north half of the north-west quarter of section twenty-three, the east half of the north-east quarter of section twenty-two, the south-west quarter of the south-east quarter of section fourteen, the east half of the south-west quarter of section fourteen, the north-west quarter of the south-east quarter of section fourteen, all in township twelve, range two, west, which lands were sold by an execution against the said defendant, as his property, by the sheriff of Choctaw county aforesaid, and purchased by the plaintiff; which said lands the said defendant unlawfully withholds from the plaintiff, and detains the same, together with five hundred dollars for the detention thereof." The grounds of demurrer were, the complaint did not allege "that the plaintiff was in possession of the land, according to the form laid down in the Code," and that the complaint was "otherwise informal and insufficient." This demurrer was overruled. And the defendant pleaded not guilty, and went to trial by a jury on this plea. It further appears from a bill of exceptions taken on the trial below, that the plaintiffs derived their title to the land in controversy from a sheriff's deed, made under authority of an execution issued on a judgment of the circuit court of Choctaw county, in this State, rendered at the fall term thereof, on the third day of September, 1866. This judgment was by default. And it appeared from the record, that the only notice which the defendant had of the proceedings, was the service of a summons purporting to have been issued out of the circuit court of the said county of Choctaw, on the 8th day of February, 1861, upon a complaint founded on a promissory note made on the 1st day of January, 1860, for the payment of $385. It also appeared that the plaintiff in said suit had died after the commencement of the same, and that it had been revived on the day judgment was rendered in the name of his personal representative, who had been appointed as such representative by the rebel probate court sitting in said county of Choctaw in 1863. And for these reasons, the judgment of the 3rd of September, 1866, was objected to by the defendant in this suit, on the trial below; but the objection was overruled by the court, and the said defendant excepted. There

[18] Part of the opinion omitted.

were many other objections made during the trial, and reserved in the bill of exceptions, which need not be more particularly enumerated. On the trial below there was a verdict and judgment for the plaintiffs, and the defendant in that court brings the case here on appeal.

The demurrer to the complaint will be first considered. This is an action for the recovery of the possession of lands, instituted under the statute. In such case, the Code directs how the suit shall be brought, and prescribes that in such cases, the law now in force in relation to actions of ejectment, except so far as relates to the fictitious proceeding therein, or except so far as the same is changed by the Code, is applicable thereto.—Rev. Code, § 2610. In this statutory action, it is sufficient for the plaintiff to allege in his complaint, *that he was possessed of the premises sued for,* describing the same by its description at the land office; or when that cannot be done, by metes and bounds, or other appropriate designation, *and that after his right accrued, the defendant entered thereupon,* and unlawfully withholds and detains the same.—Rev. Code, § 2611. The language in italics is carried into the form of complaint prescribed in the the schedule of forms appended to the Code. The form there given is as follows: "The plaintiff sues to recover the following tract of land: ——, *of which he was possessed before the commencement of this suit, and after such possession accrued, the defendant entered thereupon,* and unlawfully withholds and detains the same, together," &c.—Rev. Code, p. 677, App. of Forms. A comparison will show that the portion of the statute and the above cited form printed in italics is left out of the complaint in this case. Such a defective complaint does not bring the statement of facts necessary in such a pleading within the requirements of the statute, either in words or in substance. It is therefore insufficient.—Rev. Code, § 2629. The complaint also fails to show that the lands sued for are situated in this State, with any technical degree of certainty. The demurrer ought, therefore, to have been allowed, and the court erred in overruling it. Nor is the complaint in this case sufficient as a declaration at common law in an action of ejectment.—1 Chit. Pl. p. 187, marg.; 2 ib. pp. 877, 878; 3 Bla. Com. p. 199, marg.; 3 ib., app. No. II, p. 356; Rev. Code, § 2621. * * *

For the error first above pointed out the judgment of the court below is reversed and remanded, with instructions to sustain the demurrer to the complaint, and to permit the plaintiff in the court below to amend his complaint as may be allowed by law.[19]

[19] Possession by the plaintiff must be alleged. Parr v. Van Horn, 38 Ill. 226 (1865) semble.

An allegation of entry by the defendant or ouster of the plaintiff is necessary. Roberts v. Niles, 95 Me. 244, 49 Atl. 1043 (1901: writ of entry) sem-

SECTION 4.—DEFENSES

GENERAL ISSUE IN EJECTMENT.

(3 Chitty, Pleading [13th Am. Ed.] p. *1141.)

In the King's Bench (or "C. P.")

——— Term, ——— Will. 4.

C. D.
ats.
John Doe, on Demise of
A. B. and Others.

And the said C. D. by E. F., his attorney, comes and defends the force and injury, when, etc., and says, that he is not guilty of the said supposed trespass and ejectment (or, if several ousters are laid in the declaration, "of the said supposed trespasses and ejectments") above laid to his charge, or of any part thereof, in manner and form as the said John Doe hath above thereof complained against him; and of this he the said C. D. puts himself upon the country, etc.

SPECIAL PLEA AND GENERAL ISSUE IN EJECTMENT.

(Puterbaugh, Common Law Pleading and Practice [8th Ed.] 436.)

In the ——— ——— Court.

——— Term, 19—.

C. D.
ats. } Ejectment.
A. B.

And the defendant, by G. H., his attorney, comes and defends the wrong and injury, when, etc., and says that he is not in possession of and does not claim and has not entered upon or been in possession of or claimed any part of the lands in the said declaration described, except the following described lands, to wit, (describe same); and as to all the other land in said declaration described this defendant here and now disclaims any and all right, title or interest thereto.

ble. Accord. Gale v. Hines, 17 Fla. 773 (1880: allegation of detention by defendant is sufficient) semble. Contra.

Detention by the defendant must be alleged. Whipple v. McGinn, 18 R. I. 55, 25 Atl. 652 (1892).

That the defendant was in possession when suit was begun must be alleged. Stevens' Adm'r v. Griffith, 3 Vt. 448, 455 (1831) semble.

The same declaration may be used whether the defendant is in possession or merely claims title. Dickerson v. Hendryx, 88 Ill. 66 (1878) semble; South Park v. Gavin, 139 Ill. 280, 288, 28 N. E. 826 (1891) semble.

And for a further plea in this behalf this defendant says, that as to the said (describing lands as to which no disclaimer is made), in said declaration mentioned, he is not guilty of unlawfully withholding the same, or any part thereof in manner and form as in said declaration alleged; and of this he puts himself upon the country, etc.

BERNARD et al. v. ELDER et al.

(Supreme Court of Mississippi, 1874. 50 Miss. 336.)

SIMRALL, J.[20] delivered the opinion of the court.

This was an action of ejectment brought by the plaintiff in error, to recover possession of a parcel of land on the bay of Boboxi.

The defendant pleaded the general issue, and several pleas, setting up the statute of limitations of seven and ten years (and other matters not necessary to be stated), in bar of the action.

To these pleas there were demurrers. To some of the pleas the demurrers were sustained, and overruled as to others.

These rulings of the circuit court are assigned for error.

At the common law the defendant was permitted to make defense upon the terms that he entered into the consent rule, and pleaded the general issue. No other plea was admissible.

The statute, in dispensing with the fictions which pertained to the common law action, still confined the defendant to the plea of not guilty. Code 1857, p. 386, art. 3, under which he "may give in evidence any lawful defense to the action," except that if the defendant shall desire to dispute or deny his possession at the commencement of the action, he may do so by special plea. See art 8, p. 387. This modification became necessary because of the 5th art., which made the plea of general issue have the effect of an admission that the defendant was in possession "at the time of the commencement of the action."

The action then, as regulated by statute, admits all defenses under the "plea of not guilty," except the single one of nonpossession which must be made by special plea.

All the matters relied upon in the several special pleas were available under the general issue. Indeed, the statute dispensed with special pleading, with the exception above named. It would have been proper for the court to have ordered these pleas to have been withdrawn from the files, or to have sustained the demurrers to them, as alien to this form of action. It is not necessary therefore to consider their merits, or the decisions of the court upon them. * * *

The judgment is therefore affirmed.[21]

[20] Statement of facts and part of the opinion omitted.

[21] That generally no special pleas are proper in ejectment, see: Barco v. Fennell, 24 Fla. 378, 5 South. 9 (1888: that land in process of admin-

CUMMING et al. v. BUTLER.

(Supreme Court of Georgia, 1849. 6 Ga. 88.)

Ejectment, in Bryan Superior Court. Motion to dismiss defendant's plea, decided by Judge Fleming, at Chambers, Dec. 22d, 1848.

An action of ejectment was commenced in Bryan Superior Court, returnable to April Term, 1848, for a certain tract of land, known as Sandy Hill.

At the first term, James M. Butler, the alleged tenant, filed the following pleas:

"And now, at this term, comes the defendant, James M. Butler, in his proper person, the force and injury when, &c. and says that he is not guilty of the said trespasses in ejectment, as above laid to his charge, and of this he puts himself upon the country.

"And for further plea in this behalf, the said James M. Butler says, that at the time of the commencement of the aforesaid action in this behalf, against him, he was not in possession of the said premises, in the said plaintiff's declaration mentioned, or any part thereof, nor did he then or now claim any right, title, interest, property or possession of, in or to the said premises, but that the said premises are the property of, and claimed and held, by one John Bailey, of the County of McIntosh, in the State of Georgia; and further, that the said James M. Butler disclaims all right, title, interest, possession, property, claim or demand of, in or to the said within mentioned premises, or any part thereof; and of these several matters, he puts himself upon the country.

"[Signed] James M. Butler,
"In Proper Person."

At the trial term of said cause, the plaintiff, by his counsel, moved to dismiss and set aside the said pretended pleas, and to enter a judgment by default, against the casual ejector—

1st. Because, that part of it purporting to be the general issue, did not confess lease, entry and ouster.

2nd. Because the second part of said paper is wholly inconsistent with the general issue, and ought not to be allowed to stand.

3rd. Because the latter part of said pretended plea, being special in its character, could only have been filed by leave of the Court; and being dilatory in its character, even though it had been put in by leave

istration and so ejectment improper; also held no defense in substance) semble; Roosevelt v. Hungate, 110 Ill. 595 (1884: title in defendant) semble; Chaplin v. Barker, 53 Me. 275 (1865: insufficient right in plaintiff); Wood v. Jackson, 8 Wend. (N. Y.) 9, 35, 40, 22 Am. Dec. 603 (1831: former recovery; before New York statutes); Proprietors v. Horton, 6 Hill (N. Y.) 501 (1844: matter in abatement even; after New York statutes); Black v. Tricker, 52 Pa. 436 (1866: coverture of defendant); Pillow v. Roberts, 13 How. 472, 14 L. Ed. 228 (1851: sale for taxes and statute of limitations; Arkansas law); Reynolds v. Cook, 83 Va. 817, 825, 3 S. E. 710, 5 Am. St. Rep. 317 (1887: pleas in abatement an exception).

of the Court, it should have been passed upon and disposed of by said Court, at the first term.

4th. That the whole of said paper was contrary to the rules of pleading, and illegal; and if special circumstances authorized its admission, the existence of such special circumstances should have been shown at the first term.

Plaintiff's counsel further moved the Court, if the latter part of the plea was ruled illegal, that said Butler should be ruled to trial on the general issue.

The presiding judge overruled the motion, and decided that said Butler should have his option to go to trial on the first part of his plea, as the general issue, or on the latter part of said paper, if verified by affidavit.

The defendant's counsel struck out the first part of the plea, and went to trial upon the latter part, (verified by the affidavit of defendant), upon the question of possession alone, the Court confining the testimony to that question.

The Jury failing to return a verdict, a mis-trial was ordered, and by consent, it was ordered that plaintiff's motion to dismiss the plea and take judgment by default, should be re-argued before Judge Fleming, at Chambers.

Upon which hearing, the motion was overruled.

The Court deciding that said Butler was properly before the Court on the plea denying his possession, and that said plaintiff was properly ruled to trial, on said plea—which decisions are excepted to.

By the Court.—LUMPKIN, J., delivering the opinion.

Lord Coke deemed special pleading so delightful a science, that its very name was derived, according to him, from its pleasurable nature. "Quia bene placitare omnibus placet." My brethren, who were engaged in the management of this case, in the Circuit Court, will pardon me for suggesting, that they seem intent on restoring this exquisite recreation to its pristine state.

Had a motion been made to dismiss this writ of error, as having been prematurely brought, it must have been sustained. No final judgment has been rendered in the cause, below. There being a mis-trial, all the issues of law and fact, are still pending, and the presumption is, they will be correctly adjudicated.

The origin and growth of the action of ejectment will be found fully stated by Mr. Sergeant Adams, in the opening chapter of his Treatise on Ejectment. It is an action in which a tenant, for a term of years, claims damages for a forcible ejection or ouster from the land demised. It was invented in the reign of Edward II. or Edward III. to enable suitors to escape from the thousand niceties in which real actions were embarrassed; and which, moreover, were cognizable in the Courts of Common Pleas only. Real actions have been abolished, ejectment is the regular mode of proceeding, for the trial of possessory titles. Anciently, damages only were recoverable—subsequently, the

land itself. It is needless to add, that this form of action is entirely fictitious. It is thus described and illustrated by Lord Mansfield:

"An ejectment is an ingenious fiction, for the trial of titles to the possession of land. In form, it is a trick between two, to dispossess a third, by a sham suit and judgment. The artifice would be criminal, unless the Court converted it into a fair trial between the proper parties. The great advantage of this fictitious mode of proceeding is, that being under the control of the Court, it may be so modelled as to answer in the best manner, every end of justice and convenience. The control which the courts have over the casual ejector, enables them to put any terms upon the plaintiff which are just. He was soon ordered to give notice to the tenant in possession. When the tenant in possession asked to be admitted defendant, the Court was enabled to impose conditions; and therefore, obliged him to allow the fiction, and go to trial upon the real merits, without being entangled in the niceties of pleading on either side. Fairclaim v. Shamtitle, 3 Burr. 1294.

(1) Four things are necessary to enable a person to support an ejectment, viz: title, lease, entry and ouster. And as the three latter are only feigned in the modern practice, the plaintiff would be non-suited at the trial, if he were obliged to prove them. The Courts, therefore, compel the defendant to enter into what is called the consent rule, by which he undertakes that at the trial he will confess the lease, entry and ouster to have been regularly made, and rely solely upon the merits of his title. In England, at present, the consent rule admits possession also. The consent rule is presumed to be taken in every case, and being at best but a useless form, its observance is dispensed with in point of fact; and this dispenses with all special pleading in ejectment. The defendant can plead only "not guilty," and the Statute of Limitations.

(2) With us in Georgia, as in most of the states, the general issue in ejectment denies the defendant's possession, as well as the plaintiff's title. Stevens v. Griffith, 3 Vt. 448.

It was not necessary, therefore, in this case, that the defendant should have pleaded specially, that he was not in possession of the premises in dispute, at the time suit was commenced. And yet it was not competent for the plaintiff, on the other hand, to demur to this plea. At most, it was but an act of supererogation. The defendant did more than duty required of him. The Court was wrong in compelling the defendant to elect between these pleas, and in sending him to the jury, upon the question of possession alone. The Court might very properly, for the symmetry of its records, have directed this supernumerary plea to have been stricken out as surplusage.

It is true, that if the verdict had been for the defendant, it would have ended the case; but if the finding had been for the plaintiff, upon this issue of possession, still he would have to show title in himself, before he could have recovered. Under our system of appeals, therefore, this mode of procedure might have involved four trials instead

of two; and for this reason, if no other, the practice should be discountenanced.

Let the cause be remanded, and further proceedings be had, in conformity with this opinion.[22]

DICKERSON v. HENDRYX.

(Supreme Court of Illinois, 1878. 88 Ill. 66.)

Appeal from the Circuit Court of McLean county.

This was an action of ejectment, brought in the McLean circuit court by Frederick Hendryx against Henry C. Dickerson, Robert Lowry and Charles Craig, for the recovery of the north-west quarter of section 20, in township 23 north, range 4 east of the third principal meridian.

The declaration alleged in substance that the plaintiff, on April 20, 1874, was possessed of the land, which he claims in fee, and being possessed thereof, the defendants afterwards, on April 20, 1874, entered into said tenements, and now unlawfully withhold from the plaintiff the possession thereof, to the damage, etc.

The plea of not guilty was interposed by all the defendants, and the defendant Dickerson filed the following two special pleas, verified by his affidavit:

1. Actio non, because he says at the said time, when, etc., and at the time of commencing this suit, he was not in possession of said premises in controversy or of any part thereof, etc.

2. Actio non, because the defendants were not in the possession and occupation of said premises in manner and form as the plaintiff has above complained against them.

The plaintiff filed a demurrer to the special pleas, which the court sustained. The cause was tried by the court, who found for the plaintiff, and rendered judgment accordingly, refusing a motion for a new trial. Dickerson alone appealed.

Mr. Chief Justice SCHOLFIELD[23] delivered the opinion of the Court:

The chief question for our determination on this record is, did the circuit court err in sustaining demurrers to the two special pleas? They profess to answer the whole declaration, yet they put in issue only the possession and occupation of the premises.

[22] McCanna v. Johnston, 19 Pa. 434 (1852); Stevens v. Griffith, 3 Vt. 448, 455 (1831). Accord. Ulsh v. Strode, 13 Pa. 433 (1850). Contra.

But under modern statutes there must be a special plea denying defendant's possession. Edwardsville Co. v. Sawyer, 92 Ill. 377 (1879); James v. Brooks, 6 Heisk. (Tenn.) 150, 157 (1871) semble.

A plea of "nul disseisin" to a writ of entry does not deny that the defendant is in possession. Gibson v. Bank, 69 Me. 579, 581 (1879) semble; Alden v. Murdock, 13 Mass. 256, 259 (1816); Mills v. Peirce, 2 N. H. 9 (1819).

[23] Part of the opinion omitted.

The sixth section of the present statute relating to ejectment (Rev. St. 1874, p. 444,) is this: "If the premises for which the action is brought are actually occupied by any person, such actual occupant shall be named defendant in the suit, and all other persons claiming title or interest in the same may also be joined as defendants." The seventh section is: "If the premises are not occupied, the action shall be brought against some person exercising act of ownership on the premises claimed, or claiming title thereto, or some interest therein, at the commencement of the suit."

But whether the suit be to recover as against one in the actual occupation or possession of the premises, or as against one (the premises not being occupied) exercising act of ownership on the premises claimed, or claiming title thereto, or some interest therein, the form of averment required in the declaration is the same, and is that contained in the declaration in this record. Id. § 11.

It is provided, however, in section twenty-one, that "the plea of not guilty shall not put in issue the possession of the premises by the defendant, or that he claims title or interest in the premises." And section twenty-two is as follows: "It shall not be necessary for the plaintiff to prove that the defendant was in possession of the premises, or claims title or interest therein, at the time of bringing the suit, or that the plaintiff demanded possession of the premises, unless the defendant shall deny that he was in such possession, or claims title or interest therein, or that demand of possession was made, by a special plea verified by affidavit."

It is, therefore, obvious if defendants were claiming title or interest in the premises at the time of bringing the suit, it is not of the slightest consequence that they were not in the actual occupation or possession of the premises. No rule in pleading is better settled than that a plea professing to answer the whole declaration, which, in fact, answers but a part, is obnoxious to demurrer. Frink v. King, 3 Scam. 144; Hinton v. Husbands, 3 Scam. 187; Buckmaster v. Beames, 4 Gilman, 443; Moir v. Harrington, 22 Ill. 40; Goodrich v. Reynolds, 31 Ill. 490, 83 Am. Dec. 240. * * *

Judgment affirmed.[24]

TAYLOR v. HORDE.

(Court of King's Bench, 1757. 1 Burr. 60.)

In ejectment brought in Michaelmas term, 1752, by John Atkyns, Esq. (in the name of Cyprian Taylor) against Robert Atkyns, Esq. the heir at law, and others; upon the general issue pleaded, and the is-

[24] South Park v. Gavin, 139 Ill. 280, 289, 28 N. E. 826 (1891) semble. Contra.

sue joined thereon and tried at the bar of this court, the jury find a special verdict.

Lord MANSFIELD.[25] * * * The second general question is "whether the lessor of the plaintiff is, by the statute of limitations, barred from recovering in this ejectment."

This point was certainly not insisted upon at the trial: and therefore the special verdict is not adapted to it. * * * The point however is certainly open, upon this special verdict.

An ejectment is a possessory remedy, and only competent where the lessor of the plaintiff may enter: therefore it is always necessary for the plaintiff to shew, that his lessor had a right to enter; by proving a possession within twenty years, or accounting for the want of it, under some of the exceptions allowed by the statute. Twenty years' adverse possession is a positive title to the defendant; it is not a bar to the action or remedy of the plaintiff, only; but takes away his right of possession.

Every plaintiff in ejectment must shew a right of possession, as well as of property: and therefore the defendant needs not plead the statute, as in the case of actions.

The question then is, whether it appears upon this special verdict, "that the lessor of the plaintiff might enter, when he brought this ejectment." * * *

If the Dacres had no estate by virtue of this demise, upon the 9th of October, 1712, then this ejectment was not brought within twenty years after the lessor's title accrued: and no facts are found, to excuse him within any of the exceptions.

Therefore we are all of opinion that there should be

Judgment for the Defendants.

A writ of error was brought in the House of Lords; and came on upon Thursday 26th January 1758. The counsel agreed, and were allowed, to argue the last point, for the judgment of the house, first: because, if their lordships should be of the same opinion with the Court of King's Bench, "that this ejectment was barred by the statute of limitations," it would be quite unnecessary to go into the first question.

All the judges were ordered to attend. To whom, after the argument at the bar was over, the house proposed the following question, viz.:

"Whether sufficient appears by the special verdict in this cause, to prevent the lessor of the plaintiff, by force of the statute of limitations of the 21st of King James the First, from recovering in this ejectment."

Whereupon, the Lord Chief Justice WILLES, having conferred with the rest of the judges, delivered their unanimous answer, "that sufficient does appear by the special verdict in this cause, to prevent the

[25] Statement of facts abridged and part of the opinion omitted.

lessor of the plaintiff, by force of the statute of limitations of the 21st of King James the First, from recovering in this ejectment."

Then the judgment of the Court of King's Bench was

Affirmed, with £5. costs.[26]

[26] Trowbridge v. Royce, 1 Root (Conn.) 50 (1789); Horne v. Carter's Adm'r, 20 Fla. 45, 49 (1883: relying on statute); Stubblefield v. Borders, 92 Ill. 279, 287 (1879: same as last); Stanley v. Perley, 5 Me. 369 (1828: writ of entry); Miller v. Beck, 68 Mich. 76, 35 N. W. 899 (1888: no reasons given); Wilson v. Williams, 52 Miss. 487, 492 (1876: under statute); Gallagher v. McNutt, 3 Serg. & R. (Pa.) *409 (1817); Pillow v. Roberts, 13 How. 472, 14 L. Ed. 228 (1851: Arkansas law); Hogan v. Kurtz, 94 U. S. 773, 775, 24 L. Ed. 317 (1876: District of Columbia law). Accord.

CHAPTER III

CASE

SECTION 1.—SCOPE OF THE ACTION

ZELL v. ARNOLD.

(Supreme Court of Pennsylvania, 1830. 2 Pen. & W. 292.)

Appeal from the Circuit Court of Adams county. It was an action on the case brought by George Arnold the appellee, against Jacob Zell the appellant in the Court of Common Pleas of that county, and removed into the Circuit Court.

The plaintiff in his declaration, counted that the defendant was a mill-wright, and for a reasonable reward, and consideration, to be thereafter paid, undertook to build a clover mill, and carding machine, and to level and grade the water of a certain rivulet or brook in Betle's meadow, &c. to the dam of the plaintiff; and did then and there undertake and agree to build said mills, and grade and stake off said race in a skillful and correct manner. In consideration of the promise aforesaid, &c. yet the said Zell, then and there so negligently, carelessly, and unskillfully, graded and laid off said race and water-course, and built said mills; and so inaccurately and erroneously governed himself therein, and for want of due care and skill on the part of the said Zell, in the premises, the said mills thus built, &c. and the said race thus dug, &c. cost the said Arnold, more money than if the same had been skillfully done; and are totally useless and of no value to the said Arnold, and the water will not flow along the said race or channel to the said dam and mills aforesaid, whereby said plaintiff is entirely deprived of the use of said improvements, by him as aforesaid made, &c. to the damage of the said George Arnold, &c.

And in the second count of the said declaration, the plaintiff counted upon a promise of the defendant to build the said mills, and to level the fall of the said rivulet or brook, and to report the same correctly to the said George; and to mark or strike off the said race or channel to convey and carry the water from said brook, to the mill dam of the said George. And that the said Jacob, did report to the said George, that there was a fall of sixteen inches from the bottom of the stream of the said rivulet to the surface or top of the mill dam, &c. And that the said George, giving full faith and credit to the report of the said Jacob, &c. did expend a large

sum of money, &c. in the purchase of land and in digging and excavating the race, &c. and in building the said mills, &c. Yet, the said Jacob, did then and there, negligently, carelessly, and unskillfully, level, grade and lay off said race, &c. and build said mills, &c. that the water will not run and flow in and along and through the race aforesaid, in and to the top or surface of the mill dam of the said George, with a fall of sixteen inches, from the bottom of the same rivulet or brook, whereby the said George is entirely deprived of the use of the said mill, land, &c. by him purchased and made, &c. To the damage of the said George, &c.

On the trial of the cause, a verdict was rendered for the plaintiff, for six cents damages, whereupon the Court, over-ruling a motion made to enter the judgment without costs, gave judgment for the plaintiff with full costs, from which the defendant appealed; and now assigned for error, that the Court over-ruled the motion made by him, and gave judgment with full costs.

Fuller, Watts & Penrose, for the appellant.[1]

* * * By the act of the 20th of March, 1810, section 26, Purd. Dig. p. 459, it is provided, that if any person shall commence any suit for a debt or demand, and recover less than one hundred dollars, when the cause of action is cognizable before a justice of the peace, he shall not recover costs. By the first section of that act, Purd. Dig. p. 450, what causes of action are cognizable before a justice of the peace, are ascertained. They are "all causes of action arising from contract, either express or implied, in all cases where the sum demanded is not above one hundred dollars." The question presented is, did the cause of action upon which the plaintiff declared, arise from a contract either express or implied? * * *

Gibson, C. J. The objection at the Circuit Court was that the jury had not found costs as well as damages. That point came up in Stores v. Tong, Rep. & Ca. of Prac. in C. B. 7, in which it was held that where the jury are ex officio bound to give costs, and omit to do so, the Court will supply the deficiency. Here the plaintiff's right to costs is resisted on the ground that the cause of action was cognizable by a justice of the peace. The declaration is in case; and although the action has grown out of a contract, it is not necessarily within the act of assembly. No other contract formed an ingredient in the subject of it, than that implied by the law, which requires any one employed in an art or calling, to bring to the business a competent share of diligence and skill. The gist of an action on the case like the present, is not a failure to perform, but a failure to perform in a workmanly manner, which is a tort. Slater v. Baker, 2 Wils. 359; Dr. Groenvelt's Case, Ld. Raym. 214. An undertaking for skill and diligence is implied no further that to raise a duty, the breach of which is the gravamen and meritorious cause

[1] Part of the arguments of counsel omitted.

of the action. The difference between assumpsit which is an action directly on the contract, and case which is collateral to it, is shewn by the pleadings, the general issue in the first being non assumpsit, and in the second, not guilty. There are sometimes concurrent remedies; as in an action against a carrier who may be made to respond either immediately on the contract which affords a specific ground of action, or on the custom which raises a duty to carry the goods safely; and as the one or the other form is adopted, so may the count be joined with the other counts sounding in contract or tort. Law of Carriers, 117. In all cases where the action is not on the contract, but for the breach of a collateral duty, the gist is a personal tort; as where a smith pricks a horse in shoeing, or a farrier kills him by bad medicines or neglect: and it is emphatically the gravamen in an action against a barber for barbering his customer negligenter et inartificialiter. 2 Bulstr. 333. That the defendant's liability arose remotely out of a contract, therefore, is by no means decisive of the question. As was said in Zeigler v. Gram, 13 Serg. & R. 102, the legislature had in view a contract in the popular sense of the word; not an artificial agreement depending on a fiction of law. A special action on the case lies for what is substantially a tort, although a tort deducible from the existence of a contract. Such was not within the view of the legislature; and we are satisfied the cause of action here was not a subject for the jurisdiction of a justice.

HUSTON, J.—Dissented.

Judgment affirmed.[2]

[2] Godefroy v. Jay, 7 Bing. 413 (1831: case brought; no question raised) not even semble; Gladwell v. Steggall, 5 Bing. N. C. 733 (1839); Brown v. Boorman, 11 Cl. & F. 1 (1844); Wilson v. Coffin, 2 Cush. (Mass.) 316, 323 (1848); Howe v. Cook, 21 Wend. (N. Y.) 29 (1839) semble; Kuhn v. Brownfield, 34 W. Va. 252, 257, 12 S. E. 519, 11 L. R. A. 700 (1890) semble. Accord.

A fortiori if the defendant was exercising a common employment case will lie. Dickson v. Clifton, 2 Wilson, 319 (1766); Ansell v. Waterhouse, 6 M. & S. 385 (1817); Nevin v. Pullman Co., 106 Ill. 222, 46 Am. Rep. 688 (1883); Bank v. Brown, 3 Wend. (N. Y.) 158 (1829); McCall v. Forsyth, 4 Watts & S. (Pa.) 179 (1842); Smith v. Seward, 3 Pa. 342 (1846); So. Exp. Co. v. McVeigh, 20 Grat. (Va.) 264, 284 (1871); Spence v. Railroad Co., 92 Va. 102, 22 S. E. 815, 29 L. R. A. 578 (1895). Accord. Boson v. Sandford, 3 Mod. 321 (1686); Powell v. Layton, 2 B. & P. 365 (1806). Contra.

Still more clearly, if the act of the defendant would have been a tort had no contract existed at all, case will lie. Govett v. Radmidge, 3 East, 62 (1802); Pittsburg v. Grier, 22 Pa. 54, 65, 60 Am. Dec. 65 (1853); Reeside v. Reeside, 49 Pa. 322, 331, 88 Am. Dec. 503 (1865) semble; Dean v. McLean, 48 Vt. 412, 21 Am. Rep. 130 (1875).

See further 6 Cyc. 688; 3 Pl. & Pr. 817 et seq.: 10 Pl. & Pr. 1131.

The distinction between Case and Trespass has been treated under Trespass.

ROYCE et al. v. OAKES.

(Supreme Court of Rhode Island, 1898. 20 R. I. 418, 39 Atl. 758, 39 L. R. A. 845.)

Trespass on the case by Royce, Allen & Co. against Charles H. Oakes. Demurrer to an amended count of the declaration sustained.

TILLINGHAST, J.[3] Since the rendition of the former opinion in this case, sustaining the demurrer to the second count in the declaration (20 R. I. 252, 38 Atl. 371), the plaintiffs have amended said count so as to allege, in substance, that on the 15th day of January, 1894, they authorized and empowered the defendant, who was in their employ for hire, and acting as their agent and servant in this behalf, to collect and receive for them, from divers debtors of theirs, various sums of money, amounting, in all, to the sum of $1,714.60, and thereupon to deliver the same to the plaintiffs. And they aver that the defendant thereafter, in pursuance of said authority, collected said sum of money, and that thereupon it became his duty to pay over the same to the plaintiffs; but that, not regarding his duty in that behalf, although duly requested, intending and contriving to injure and defraud the plaintiffs, he neglected and still neglects to pay said money to them. And the plaintiffs declare that said refusal was negligent, fraudulent, and in violation of his duty, and that by reason of the premises they are deprived of the possession and benefit of said money. To this amended count the defendant has demurred, on the grounds (1) that the cause of action, if any, set forth therein, is an action of contract, and not an action sounding in tort; and (2) that the injury alleged to have been suffered by plaintiffs has been suffered by reason of the commission of the crime of larceny, and that it does not appear that any criminal complaint has been made therefor.

We think the demurrer should be sustained on the first ground. The amended count differs from the former one, which we held amounted to a charge of embezzlement, in that it does not allege a fraudulent conversion of the money by the defendant to his own use, but simply alleges a breach of duty in not paying over the same to the plaintiffs after demand made therefor. In other words, when stripped of its formalities, it simply shows a case where a servant or agent has collected money for his principal and neglected to pay it over on demand,—that is, a case of money had and received by the defendant to the plaintiffs' use,—and hence the plaintiffs' remedy, and their only remedy, is by assumpsit or debt. It is true, as contended by plaintiffs' counsel, that the action of trespass on the case is an exceedingly broad and comprehensive form of action, and that it lies, in general, where a legal injury is suffered for which the com-

[3] Part of the opinion omitted.

mon law has provided no adequate remedy. 26 Am. & Eng. Enc. Law, 699, and cases in note 5. But, in a case like the one set out in said count, the common law has provided an adequate remedy in an action of assumpsit; and to permit the plaintiffs to maintain their action of trespass on the case would, in effect, be to abolish the distinction between actions sounding in tort and those sounding in contract, and enable a plaintiff in any case, where money has been had and received by another to his use, to sue in a tort action for its recovery.

In Orton v. Butler, 2 Chit. 343, the same thing was attempted under a declaration the third count of which was nearly identical with the count now in question, except that there the plaintiff stated a stronger case by alleging a conversion of the money received, as the plaintiffs originally did in the case at bar. In sustaining the demurrer to the third count, Abbott, J., said: "The law has provided certain specific forms of action, suited to the recovery of damages, for certain peculiar injuries. We have a smaller variety of forms in our law than is to be found in the civil law. We have not many, but it is of importance that those we have should be preserved, and that parties should not be permitted, by their own invention, to convert that which from the earliest times has been considered as peculiarly the subject of assumpsit or debt into an action of tort. We are to look with jealousy at any innovation of that kind, so that nothing like a precedent shall be established, tending to destroy those sound distinctions which have been established by the wisdom of our ancestors." Best, J., added: "I am of the same opinion. This is a departure from all precedents; and, even if I were satisfied that it might not be attended with inconvenience, still I think we ought not to permit any innovation upon the ancient forms of proceeding, which are to be considered as part of the settled law of the land. As well might we alter the doctrine of descents as to freehold property, as alter the long-established forms prescribed for the recovery of debts. We are not at liberty to do so. There is a broad distinction between causes of action arising ex contractu and ex delicto. This is one arising ex contractu. There is no wrong stated, but merely a breach of contract; and the plaintiff is not at liberty to convert a mere matter of contract into a tort. The consequences of a departure from the ancient forms have been well pointed out in argument. In addition to those may be mentioned that, by altering the remedy, the defendant would be deprived of his plea of tender, and also of the advantage of paying money into court. But, if no such consequences were to follow, I think we ought to adhere to those ancient forms, which have been perfected by the wisdom of ages, and confirmed in their utility by the experience of many centuries."

It has never been understood by the bar in this state that a tort action could be maintained for money had and received, even though

the person receiving the same has negligently and fraudulently refused to pay over the same to the person to whose use it was received, or has even converted it to his own use, except, at any rate, as provided by statute, after the commencement of a criminal prosecution. Gen. Laws R. I. c. 233, § 16. On the contrary, the understanding has always been that assumpsit and debt are the only actions that can be employed in such cases; and we think this position is clearly in accordance with the well-settled rules relating to common-law actions. The authorities cited by plaintiffs' counsel do not, in our judgment, sustain his position. They are mostly cases of negligence for failing to discharge some common-law duty arising from a contract, and hence are proper subjects for trespass on the case. 1 Chit. Pl. 151, 152. The celebrated and familiar case of Coggs v. Bernard, 2 Ld. Raym. 909, is an example. Dickson v. Clifton, 2 Wils. 319, was case, for undertaking to carry and deliver some malt for the plaintiff, and for so carelessly discharging his duty that the malt was embezzled and lost. Elsee v. Gatward, 5 Term R. 143, was tort, for negligence in regard to the use of new material, instead of old, in the repair of certain buildings, contrary to plaintiff's order, which the court held to amount to a misfeasance, and hence a good foundation for the action. Brown v. Boorman, 11 Clark & F. 1 (see 3 Q. B. 511), is a case where the plaintiff employed defendant as a broker to sell and deliver oil for cash, but, not regarding his duty, he sold and delivered the oil without obtaining payment therefor; and the court held that case was a proper remedy, although the duty imposed upon the defendant arose out of an express contract. That decision gave rise to the supposition that every action for a breach of contract might be considered as an action of tort. But in the subsequent case of Courtenay v. Earle, 10 C. B. 73, the court effectually disposed of that impression; Williams, J., saying that the judgment in the former case by no means warranted such a conclusion, and that the court did not intend to overrule the case of Corbett v. Packington, 6 Barn. & C. 268. In the last-mentioned case, one count in the declaration stated that the plaintiff, at the request of the defendant, had caused to be delivered to him certain boars, pigs, etc., to be taken care of by the defendant for the plaintiff, for reward, and that, in consideration thereof, the defendant undertook and agreed with the plaintiff to take care of the boars, etc., and to redeliver the same on request; and it was held, on motion in arrest of judgment, that this was a count in assumpsit, and could not be joined with counts in case. Jervis, C. J., in referring to Brown v. Boorman, in the case of Courtenay v. Earle, supra, said: "If the case of Brown v. Boorman were an authority to the full extent to which it has been pressed by counsel, no doubt the third and fourth counts here might well be joined with counts in tort. But, upon examination, that case will be found to proceed upon this principle: That where there is an employment,

which employment itself creates a duty, an action on the case will lie for a breach of that duty, although it may consist in doing something contrary to an agreement made in the course of such employment by the party upon whom the duty is cast. And, if that be so, the case is reconcilable with the other cases with which it has been supposed to be in conflict." In Burnett v. Lynch, 5 Barn. & C. 589, cited by plaintiffs, an action of tort was sustained where it appeared that defendant was the assignee of a lease with covenants for certain repairs, which defendant neglected to make. Godefroy v. Jay, 7 Bing. 413, was tort against an attorney who undertook to defend an action, and so negligently conducted himself with reference thereto that judgment was signed against the defendant. See, also, Zell v. Arnold, 2 Pen. & W. (Pa.) 292; McCall v. Forsyth, 4 Watts & S. (Pa.) 179; McCahan v. Hirst, 7 Watts (Pa.) 175, cited in Reeside's Ex's v. Reeside, 49 Pa. 322, 88 Am. Dec. 503.

These cases, and others of like character which are cited, are clearly distinguishable from the case at bar, which is not based upon negligence proper, as that term is understood in the foregoing cases and in analogous cases, nor upon any common-law duty arising out of a contract, but upon a simple neglect to pay over money when due, as that term is ordinarily used and understood in declarations in actions of debt or assumpsit. * * *

Finally, we do not think that the mere fact that the plaintiffs in the case at bar allege in their declaration that the neglect complained of was with the intent to defraud changes such neglect into a tort. Howe v. Cooke, 21 Wend. (N. Y.) 29. If this were so, we see no reason why any debtor might not be sued in a tort action if the plaintiff should see fit to allege that he had fraudulently neglected to pay his debt, and thus revive imprisonment for debt.

Demurrer sustained, and case remitted to the common pleas division for further proceedings.[4]

[4] Bretherton v. Wood, 3 Brod. & Bing. 54 (1821) semble; Corbett v. Packington, 6 B. & C. 268 (1827); Courtenay v. Earle, 20 L. J. (N. S.) C. P. 7 (1850) semble; Woods v. Finnis, 7 Ex. 363 (1852) semble. Accord. Burnett v. Lynch, 5 B. & C. 589 (1826); Phila. Co. v. Constable, 39 Md. 149 (1873); Ashley v. Root, 4 Allen (Mass.) 504 (1862). Contra.

The well-known cases, permitting an action on the case for breach of a non-fraudulent warranty made in connection with a sale of property, are also contra. Stuart v. Wilkins, 1 Doug. 18 (1770) semble; Williamson v. Allison, 2 East, 446 (1802); Osgood v. Lewis, 2 Har. & G. (Md.) 495, 520, 18 Am. Dec. 317 (1829); Carter v. Glass, 44 Mich. 154, 6 N. W. 200, 38 Am. Rep. 240 (1880); Lassiter v. Ward, 33 N. C. 443 (1850); Schuchardt v. Allen, 1 Wall. 359, 17 L. Ed. 642 (1863); Beeman v. Buck, 3 Vt. 53, 21 Am. Dec. 571 (1830); Trice v. Cochran, 8 Grat. (Va.) 442, 450, 56 Am. Dec. 151 (1852).

In Clark v. Foster, 8 Vt. 98 (1836), the court refused to allow case for breach of warranty of authority by an agent unless fraud were present.

There is authority for the view that, if the common law duty which arises as incidental to a contract is enlarged by the contract, case will not lie for the breach of such additional duties. Corbett v. Packington, 6 B. & C.

CITY OF PAWTUCKET v. PAWTUCKET ELECTRIC CO.

(Supreme Court of Rhode Island, 1905. 27 R. I. 130, 61 Atl. 48.)

Trespass on the case by the city of Pawtucket against the Pawtucket Electric Company. On demurrer to defendant's pleas. Overruled.

BLODGETT, J.[5] The plaintiff declares in case for the recovery of the amount of a judgment for the sum of $2,250, with interest and costs, which it has been obliged to pay to one Ryder because of a defect in a highway, which defect, it is averred, was caused by the act of the defendant in the improper laying of certain underground pipes therein, under the provisions of an ordinance of the city duly accepted in writing by the defendant. The provisions of this ordinance the defendant has duly given a bond in the sum of $10,000 to perform. The defendant has pleaded the ordinance and bond in abatement, and maintains that its liability, if any, is to be determined thereby, and not otherwise; and to this plea the plaintiff has demurred, contending that the latter liability is a cumulative liability, merely, and does not preclude a resort to a present right of action in case. By agreement of parties the ordinance and the bond are made a part of the pleadings in the case.

It is indisputable that the parties to a contract may create a new and alternative remedy for its breach without interfering with the common-law rights, duties, and remedies existing apart from the contract, and when that intent is manifest it may properly control. Indeed, it may often be presumed that such was the intent if both rights and remedies can coexist without inconsistency or incongruity.

In the case at bar an examination of the ordinance and bond in question shows that the respective rights, duties, and liabilities of the parties are changed thereby in many respects. Among these changes, it may be observed that the limit of liability on the bond is $10,000, although the city may be put to an expense far in excess of that amount. The company is to pay a certain sum for the use of the streets for a certain term, and, in consideration thereof, contracts to save harmless the city, as follows (section 2, cl. "e"): "The said company, its successors and assigns, shall at all times save and keep the city of Pawtucket, its officers, servants, agents, and employés, fully indemnified from all loss, damages, costs, and expenses that may in any wise occur from any act or omission of said company, its successors and assigns, and its or their officers, servants, agents, and employés; and if any proceeding whatsoever be instituted against said city, or its city treas-

268 (1827); Legge v. Tucker, 1 H. & N. 500 (1856); Nevin v. Pullman Co., 106 Ill. 222, 46 Am. Rep. 688 (1883) semble; Spence v. Railroad Co., 92 Va. 102, 116, 22 S. E. 815, 29 L. R. A. 578 (1895) semble. Accord. Brown v. Boorman, 11 Cl. & F. 1 (1844: many of the judges going expressly on this ground) semble; So. Exp. Co. v. McVeigh, 20 Grat. (Va.) 264, 284 (1871) semble. Contra.

[5] Part of the opinion omitted.

urer, because of any such act or omission, the said company, its successors and assigns, shall assume defence thereof at its or their own cost." This is a clear extension of the ordinary liability for their own negligence only. Again, the company binds itself to "keep all portions of the streets and sidewalks so replaced by them, in good condition for twelve months from the time of replacing the same," even though such work of repairing be done by the city. It is evident that independent of the ordinance there is no liability upon the part of the defendant to keep the streets in repair for 12 months, or for any other period after approval and acceptance of such work by the city, and it is even more apparent that the defendant would not be liable otherwise for the default of the city in making such repairs. Enumeration might be made of other differences, such as the statutory period of limitations of 20 years in debt, and of 6 years in case, and the survivorship of the right of action as against an individual defendant similarly situated; but these considerations are sufficient to compel the conclusion that, inasmuch as the parties have heretofore entered into a contractual relation to determine their respective rights and liabilities upon the happening of precisely the contingency which has now arisen, reason no longer remains for the imposition of an implied or noncontractual liability, and they must be relegated to their own voluntary agreement relative thereto, and that the form of agreement and the convention of the parties are to prevail over the provisions of the law. "Modus et conventio vincunt legem." Barrett v. Duke of Bedford, 8 Term Rep. 605; Baber v. Harris, 9 Ad. & El. 535; Schlencker v. Moxsy, 5 Dow & Ryl. 750; Jones v. Hill, 1 Moore, 100.

An examination of the decisions cited by the plaintiff shows that in certain cases, indeed, a plaintiff may sue in assumpsit or may rely upon the tort. But no one of them is a case of this nature, and, on the contrary, all the cases which counsel have cited in which a municipality has sought to recover from a contractor under similar circumstances present questions arising upon a contract or upon an ordinance or a bond, and all of them apparently proceed upon the theory that the only liability is the liability thereby created. * * *

While the law is well settled in this state, by repeated adjudications, that a contractor or third person may be thus answerable over to a municipality in the absence of a contractual relation between them—Bennett v. Fifield, 13 R. I. 139, 43 Am. Rep. 17; Pawtucket v. Bray, 20 R. I. 17, 37 Atl. 1, 78 Am. St. Rep. 837—yet a contrary view was held in City of Buffalo v. Holloway, 7 N. Y. 493, 57 Am. Dec. 550; and while we are of opinion that the weight of later authority establishes the law elsewhere as it has been held to be established in this state, it is instructive to consider that liability in such a case as the one at bar has not been unanimously conceded elsewhere unless upon a contract relative thereto. And see Spokane v. Costello, 33 Wash. 98, 74 Pac. 58; City of Kansas v. O'Connell, 99 Mo. 357, 12 S. W.

791; Becker v. Keokuk Waterworks, 79 Iowa, 419, 44 N. W. 694, 18 Am. St. Rep. 377; City of New York v. Baird, 176 N. Y. 269, 68 N. E. 364.

Demurrer overruled, and cause remanded to the common pleas division for further proceedings.[6]

AYER v. BARTLETT.

(Supreme Court of Massachusetts, 1829. 9 Pick. 156.)

A., being the owner of a factory and the machinery in it, gave a bond to S., conditioned that he would convey them to S., when certain negotiable notes given as the consideration, should be paid, and that S. should have the possession of the property, so long as he continued to pay the notes as they became due, and no longer, and possession was delivered immediately, pursuant to the bond. Before the first note became due, the machinery was attached as S.'s property, and was removed from the factory by the officer, who, before the removal, had full notice of A.'s title, and the machinery was afterwards sold on execution. A. then brought an action against the officer, in which the declaration contained counts in trover and case.

PUTNAM, J.,[7] at a subsequent day in this term, delivered the opinion of the Court. It has been settled in the former decision of questions of law raised in this case, that the bond was to be considered as a contract for a sale, and not as an actual sale which vested the property in Scholfield. It was intended that the property in the factory, as well as in the machinery, should continue in Ayer until Scholfield should have paid the notes, at the times when they should become due, but that Scholfield should have the actual use and occupation of the property so long as he complied with the conditions, and no longer. The attachment and the sale by the defendant were made before the first instalment became due, while Scholfield had the possession and the right to the possession.

And, unless the contract were rescinded, it is our opinion, that the plaintiff could not maintain trover for the injury of which he complains.

Lord Kenyon had indeed ruled otherwise in Ward v. Macauley, 4 T. R. 489, but that was an action of trespass, in which the point now under consideration did not arise. And his lordship and all his brethren, in the case of Gordon v. Harper, 7 T. R. 11, considered

[6] Case may be brought for breach of quasi contract. Adamson v. Jarvis, 4 Bing. 66 (1827); Cane v. Chapman, 1 Nev. & P. 104 (1836); Moore v. Appleton, 26 Ala. 633 (1855); Britt v. Pitts, 111 Ala. 401, 405, 20 South. 484 (1895).

[7] Statement of facts taken from headnote and part of opinion omitted.

that the opinion upon this point in Ward v. Macauley, was extra-judicial; and all concurred in the opinion, that the plaintiff must have a right to the possession as well as the right of property, to maintain trover.

The case is there put, of a right to use a factory with the machinery, as an interest (more or less valuable) which might be taken by creditors during the term. Now Scholfield had the right to use the machinery and this factory from the 1st of November, when it was attached, until the first of February, when the first note fell due; and if he should have paid that note, then he was to have the use of the factory and machinery until the next note should become due; and so on, until the whole amount should be paid.

The creditor of Scholfield can be in no better situation than he would have been in himself. If he had taken down the machinery, and removed it from the factory and sold it, such conduct would have been unlawful, and according to the case of Farrant v. Thompson, 5 Barn. & Ald. 826, might have been considered as a putting an end to the contract on his part, and a revesting of the possession in the owner by the operation of law, so as to enable him to maintain trover against the vendee. And it has been argued for the plaintiff, that the same result should follow a removal and sale by the creditors, or a sheriff on their behalf; that by such acts the contract between Ayer and Scholfield would be terminated, so as to enable Ayer to maintain trover immediately against the officer. It is to be remarked, that the proceedings of the creditors and of the officer, under the processes of law against Scholfield, were in invitum; so that what might have been properly considered as a termination of the contract, if it had been done by Scholfield himself, might not have that effect if done by others against his will. The case of Smith v. Putnam, 3 Pick. 223, was determined upon that distinction. But the plaintiff has filed counts in trespass upon the case, which are adapted to the facts proved. He has proceeded at the trial upon the ground that the contract was in force, and the jury were instructed not to allow any damage for the detention of the property from the time of the attachment to the first of February, when the first note should have been paid. It is not necessary therefore to determine, whether or not the contract was terminated by the officer, acting for the creditors of Scholfield.

It has been contended for the defendant, that no action whatever will lie for the plaintiff under the circumstances of this case. Now it has been already decided, that this was a lawful contract which the plaintiff made with Scholfield, and the jury have found that it was an honest transaction. We think that this objection is unfounded. If trover could not, we are satisfied that trespass upon the case could be maintained for such an injury to the reversionary interest in personal property. In 1 Chit. Pl. 197, it is said, that case is the proper remedy; and counts in trespass upon the case may be joined with

a count in trover. 1 Chit. Pl. 195, (7th Am. Ed. 230,) of Joinder of Actions. * * *

The motion for a new trial must be overruled, and judgment rendered according to the verdict.[8]

MOUNT v. HUNTER.

(Supreme Court of Illinois, 1871. 58 Ill. 246.)

Mr. Justice Walker[9] delivered the opinion of the court:

This was an action on the case, brought by appellee, in the Logan circuit court, against appellant. The ground of recovery was the turning of appellant's sheep, affected with a contagious disease, upon the open prairie with appellee's sheep, whereby they became diseased. The action was brought under the 2nd section of the act of February 16, 1865. (Sess. Laws, p. 126.) It declares, "If any person shall suffer to run at large, or keep in any place where other creatures can have access to, and become infected, any sheep known to the owner or person having the care or possession thereof, to be affected with any contagious disease, such person shall be liable to pay all damage that may result from the running at large of such diseased sheep."

On a trial in the court below, the jury found the issues for the plaintiff, and assessed his damages. Motions for a new trial and in arrest of judgment, were entered, but were overruled by the court, and a judgment was rendered on the verdict.

It is first urged, that the declaration is so defective the judgment should have been arrested. The grounds urged, are, that the suit is

[8] Dean v. Whitaker, 1 C. & P. 347 (1824) semble; Brown v. Boorman, 11 Cl. & F. 1 (1844); Arthur v. Gayle, 38 Ala. 259, 266 (1862); Ehrman v. Oats, 101 Ala. 604, 14 South. 361 (1893) semble; Coffey v. Wilkinson, 1 Metc. (Ky.) 101 (1858) semble; Hall v. Snowhill, 14 N. J. Law, 8 (1833); Cole v. Robinson, 23 N. C. 541, 544 (1841) semble; Shreeve v. Adams & Co., 6 Phila. (Pa.) 260 (1867).

A pledge of goods has been held a sufficient injury to the reversion. Smith v. White, 6 Bing. 218 (1840). Other acts amounting to a conversion, but in fact not injuring the goods, have been held sufficient to maintain case upon. Coe v. English, 6 Houst. (Del.) 456 (1881); Googins v. Gilmore, 47 Me. 9, 74 Am. Dec. 472 (1859). Accord. Scarbrough v. Rowan, 125 Ala. 509, 511, 27 South. 919 (1899) semble. Contra.

The same principle has been applied in the case of corporeal hereditaments. Ripka v. Sergeant, 7 Watts & S. (Pa.) 9, 13, 42 Am. Dec. 214 (1844); Schnable v. Koehler, 28 Pa. 181 (1857). Accord. Baxter v. Taylor, 4 B. & Ad. 72 (1832). Contra.

An injury to the reversion is essential. Injury to land: Baxter v. Taylor, 4 B. & Ad. 72 (1832); Simpson v. Savage, 1 C. B. N. S. 347 (1856); City v. McDonough, 112 Ill. 85, 1 N. E. 337 (1884) semble; Hastings v. Livermore, 7 Gray (Mass.) 194 (1856). Injury to easements: Tinsman v. Railway, 25 N. J. Law, 255, 266, 64 Am. Dec. 415 (1855) semble; Gillison v. City, 16 W. Va. 282, 305, 37 Am. Rep. 763 (1880). Injury to chattels: Tancred v. Allgood, 4 H. & N. 444 (1859). Accord.

[9] Statement of facts and part of opinion omitted.

for a penalty, and debt, and not case, is the proper form of action, and that the declaration does not conclude against the form of the statute.

One of the divisions of statutes is remedial and penal. A remedial statute has for its object either to redress some existing grievance, or to introduce some regulation or proceeding conducive to the public good. The remedy for the breach of a remedial statute, is by an action for damages sustained from such a breach, at the suit of the party injured. A penal statute imposes a penalty upon the commission of the prohibited offense, which is recovered by an action of debt, in the name of the informer, for his own use, or qui tam. The statute fixes the amount of the penalty, and hence the action of debt is appropriate, while in actions under remedial statutes, the party injured recovers the amount of injury he has sustained by a breach of the statute, and case is generally the appropriate remedy. These distinctions are elementary, and require the citation of no authorities for their illustration. * * *

Judgment affirmed.[10]

[10] Bristow v. Wright, 2 Doug. 665 (1781: was used) not even semble; Ross v. Horsey, 3 Har. (Del.) 60 (1840); Cockrill v. Butler (C. C.) 78 Fed. 679, 682 (1897); Heridia v. Ayres, 12 Pick. (Mass.) 334, 343 (1832). Accord.

The rule is the same where a like cause of action arises under a Constitution. County v. Brower, 117 Pa. 647, 656, 12 Atl. 577, 2 Am. St. Rep. 713 (1888); Delaware County's Appeal, 119 Pa. 159, 171, 13 Atl. 62 (1888) semble.

In Bullard v. Bell, Fed. Cas. No. 2,121 (1817: Cir. Ct. for D. N. H.) the court said:

"Lord Holt is reported to have said, that the case of debt upon this statute was at first a strain, because it gave an action of debt, whereas the statute gave treble damages; but the party should rather have had an action on the statute. College of Physicians v. Salmon, 1 Ld. Raym. 680. His lordship, however, was clearly mistaken; for the words of the statute give the treble value, and not treble damages; and debt lies in every case of a penalty, where the sum is certain, or can be readily reduced to a certainty, as the treble value may. But the very distinction alluded to by his lordship clearly shows that though debt is in general the remedy for penalties and forfeitures on statutes, yet that is not universally so. For the remedy follows the nature of the case, and debt lies only when, by analogy to the rules of the common law, the duty or penalty lies not in unliquidated damages, but is capable of being reduced to a certainty. So, if the forfeiture be of a chattel, detinue, and not debt, is the proper remedy. And cases may arise under a statute, in which the parties may have divers remedies. For instance, by the statutes of New Hampshire and Massachusetts, towns are obliged to support paupers having settlements therein; and are compellable, in certain cases, to pay the expenses incurred by other towns on account of such paupers. Actions of assumpsit upon these statutes are very frequent; and (assuming that corporations have a capacity to make a promise) there cannot be a doubt, that the action well lies; for the statutes create a direct and immediate liability quasi ex contractu. But there can be as little doubt, that an action of debt will lie in the same case, as the claim is for a determinate sum of money, arising from a legal and direct duty, if the statute do not point to any other form of action. The result of this examination instructs us, that the action to be pursued to enforce a statutable right, obligation, or remedy for a grievance, is not necessarily debt, but depends upon the subject-matter and nature of the provisions of the statute; and that it is not sufficient, in the present case, for

SECTION 2.—NECESSARY ALLEGATIONS

DECLARATION IN CASE FOR INJURY TO LAND.

(2 Chitty, Pleading [13th Am. Ed.] pp. *596, *776.)

In the Common Pleas.

——— next after ——— in ——— Term, ——— Will. 4.

——— (to wit.) C. D. was attached to answer A. B. of a plea of trespass on the case, and thereupon the said A. B. by E. F. his attorney, complains, for that whereas the said plaintiff, before and at the time of the committing of the grievances hereinafter mentioned, was, and from thence hitherto hath been, and still is, lawfully possessed of a certain messuage and premises, with the appurtenances, situate in the county aforesaid, and in which said messuage and premises, the said plaintiff and his family have, for and during all the time aforesaid, resided and dwelt, and still do reside and dwell, to wit, at, &c. (venue); nevertheless the said defendant, contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said plaintiff in the possession, use, occupation, and enjoyment of his said messuage and premises, and to render the same incommodious, unfit for habitation, and of little or no use or value to the said plaintiff, whilst the said plaintiff was so possessed thereof, and so resided and dwelt with his family as aforesaid, to wit, on the day and year aforesaid, at, &c. (venue) aforesaid, wrongfully and unjustly erected and built, and caused and procured to be erected and built, a certain building near to the said messuage and premises of the said plaintiff, in so careless, negligent and improper a manner, that by reason thereof, afterwards, to wit, on the day and year aforesaid, and on divers other times afterwards, and before the commencement of this suit, divers large quantities of rain-water ran and flowed from the said building down to, upon, against, and into, the said messuage and premises of the said plaintiff, and the walls, roofs, ceilings, beams, wainscottings, papering, floor, stairs, doors and other parts thereof, and therein being, and thereby greatly weakened, injured, wetted, and damaged the said messuage and premises of the said plaintiff, and the said walls, roofs, ceilings, wainscottings, paperings, floors, stairs, doors, and other parts thereof, and by reason of the premises, the said messuage and premises of the said plaintiff became, and were and are damp, incommodious, and less fit for habitation; and also, by reason of the premises, one G. H. who before the time of committing of the said grievances had resided and lodged in the said messuage and premises of the said plaintiff as a lodger, at a certain rent

the defendant to establish affirmatively, that an action of assumpsit or case might well lie; but negatively, that an action of debt will not."

and profit payable by the said G. H. to the said plaintiff in that behalf from the time of the committing of the said grievances, hath hitherto ceased to reside or lodge in such messuage and premises as a lodger or otherwise, and hereby the said plaintiff hath lost divers great gains and profits, which she would have otherwise enjoyed and received, to wit, at, &c. (venue) aforesaid. Wherefore the said plaintiff saith that he is injured, and hath sustained damage to the amount of £———., and therefore he brings his suit, &c.

GEORGE v. FISK & NORCROSS.

(Supreme Court of New Hampshire, 1855. 32 N. H. 32.)

Case, brought to recover damages of the defendants as partners, under the firm of Fisk & Norcross, for causing the obstruction of the Pemigewasset river, by means of logs placed therein, whereby the plaintiff's land was flowed and injured.

The declaration contained four counts, the first of which was as follows:

"In a plea of the case for that the plaintiff, on the first day of February, A. D. 1850, at Woodstock aforesaid, was, and ever since has been, seized of a tract of land in said Woodstock, and bounded on the north by land of Charles Fifield, east by land of David Woodbury, south by land of David Woodbury, Jr., and west by Pemigewasset river, containing fifty acres, more or less. And the defendants, not ignorant thereof, then and there did wrongfully cause to be placed in said river, above said tract of land, large quantities of logs, timber and trees, to wit, ten thousand logs, trees and lumber, containing one million feet, and did wrongfully and negligently permit the same to accumulate, obstruct and dam up the said river below and near the plaintiff's said land, and opposite to the same, and did neglect properly to direct, drive and float said logs, trees and lumber, so as to keep them clear of said land, whereby said river became, and was, in consequence of defendant's negligence, greatly dammed up; and the plaintiff's said land was overflowed and drowned thereby, and said logs were thus negligently and wrongfully permitted by defendants to float upon said land, and the same then and there, by the force and pressure of said stream, and by the logs, trees and timber aforesaid, did wash away, gully out and subvert the soil, and injure and destroy the plaintiff's grass, then and there growing, and did otherwise greatly damage said land, and lessen it in value."

The other counts were substantially the same as the first, alleging the injuries to have been caused in February, 1851, 1852 and 1853.

EASTMAN, J.[11] * * * The next question is, whether the action can be maintained upon the plaintiff's declaration. This question, as

[11] Statement of facts abridged and part of opinion omitted.

well as the others presented in the case, is not so clear as the first, but upon the whole we think the verdict may be sustained.

The plaintiff was in possession of the land under a bond for a deed from the town of Woodstock. By this bond the town, who owned the land, agreed that they would convey the premises to the plaintiff, on condition that he should support his father, mother, and grandmother during their natural lives; and they further agreed that he should have the use and profit of the farm so long as he should render the support to the individuals named; and that he should have the privilege of managing and cultivating it without waste or detriment, &c. So long, then, as the plaintiff performed the conditions of the bond, he was entitled to the possession, free use, profit and income of the farm, and was also acquiring an interest in the land itself beyond that of a mere tenant, which would eventually, provided he continued to fulfill the conditions of the bond, give him a title to the place. See Pritchard v. Brown, 4 N. H. 397, 17 Am. Dec. 431; Edgerly v. Sanborn, 6 N. H. 397. In the latter case it was held that he who is in possession of land under a bond for a deed, and has paid part of the consideration, has such an interest in the land as may be taken by extent.

The plaintiff, at the time the damage complained of was done, had performed a part of the consideration of the bond, and up to the time of the trial of the cause had supported the individuals according to the condition of the same. His father, however, had in the meantime deceased; an event which made the conditions less onerous, and which would add to the inducement to complete all the requirements of the bond.

The defendants contended that upon this proof of title the action could not be maintained upon the present declaration.

The plaintiff alleges that he was seised of the premises, and that the defendants, not ignorant of the fact, committed the grievances complained of, whereby the soil was subverted, the grass then and there growing destroyed, and the land otherwise greatly injured and lessened in value. No specific title to the land is alleged, nor was it necessary that there should be, as mere possession is sufficient to maintain an action against a wrong doer. But the plaintiff can recover for nothing beyond what his right and interest shown will entitle him to.

It is well settled that both the tenant and landlord may maintain actions for injuries done to the soil, or buildings upon it. They are both injured, but in different degrees; the tenant in the interruption to his estate and the diminution of his profits, and the landlord in the more permanent injury to his property. Both may have separate actions for their several damages, and a recovery is to be had according to their respective interests. Rolles' Abr. Trespass, N. 3, 4, 5, 67; 1 Saund. 322, note 3; Vin. Abr. Trespass, 3, 4; Co. Litt. 57, a, note

2; 2 Chitty's Pl. 386; 2 Greenl. Ev. § 469; Starr et al. v. Jackson, 11 Mass. 519; Baker v. Sanderson, 3 Pick. (Mass.) 348; Davis v. Jewett, 13 N. H. 88; Plumer v. Harper, 3 N. H. 88, 14 Am. Dec. 333.

It is immaterial whether the tenancy be one at will or for years; the action may be maintained and a recovery had according to the damage.

If the action is brought by the landlord or reversioner, who is out of possession, his specific interest in the property affected should be described. Not being in possession, his damages cannot be known, except by a correct description of his title and the injury received, and his interest in the property should be stated according to the facts. Davis v. Jewett, 13 N. H. 88, 14 Am. Dec. 333; Baker v. Sanderson, 3 Pick. (Mass.) 348; 1 Chitty's Pl. 142; 2 Chitty's Pl. 378.[12]

But where the plaintiff is in possession, in describing his right or interest in the property against a wrong doer for the recovery of damages and not the land itself, it is sufficient to state in the declaration that the plaintiff at the time of the injury was possessed of the land. His rights and interest are matters of evidence only.[13] 1 Saund. on Pl. & Ev. 339; 2 Saund. 113, a, note 1; Id. 172, note 1; Rider v. Smith, 3 Term, 766.

This plaintiff showed himself in possession of the premises described in the declaration, and that his possession was not dependent upon the will of the owners of the soil. As long as he kept the condition of the bond, so long was he entitled to the possession of the land, and no one could rightfully deprive him of the possession. He was, therefore, more than a mere tenant at will or lessee for years. He had in fact a freehold interest in the property; and although the fee in the land was not in him but in the town, yet his interest was of the character that might eventually ripen into a perfect title to the premises.

But the declaration alleges only that the plaintiff was "seized" of the land. It does not in terms allege possession. Were seizin possession merely, as is said in Frost v. Cloutman, 7 N. H. 9, 15, 26 Am. Dec. 723, the plaintiff would need to show only possession as against a wrong doer; but it is believed that technically and more strictly speaking, a seizin of land is something more than a bare naked possession; that it is the possession of at least a freehold. In either view, however, the declaration would be sufficient. The plaintiff had a possession, which was coupled with an interest in the prem-

[12] 1 Chitty, Pleading [16th Am. Ed.] *395 (no citations); 21 Pl. & Pr. 912 (citations given by court so far as in point). Accord.

Probably the rule is the same as to chattels. 1 Chitty, Pleading [16th Am. Ed.] *394 (no citations).

[13] North v. Cates, 2 Bibb (Ky.) 591 (1812). Accord. In Terry v. Stradwicke, 2 Lev. 156 (1675), it was held that an allegation that "goods are on land of the plaintiff" was bad.

ises, that was not limited to any specific term, and a term not limited is a freehold.

The declaration then was sufficient to maintain the action, and the evidence was competent to sustain the declaration. * * *

Judgment on the verdict.

JACKSON v. PESKED.

(Court of King's Bench, 1813. 1 Maule & S. 234.)

Action upon the case. The declaration stated, that before and at the time of committing the grievances hereinafter mentioned, a certain yard and part of a certain wall, situate, &c. was in the possession and occupation of one William Frisk, as tenant to the plaintiff, the reversion thereof then and still being in the plaintiff, to wit, at, &c.; yet the defendant well knowing the premises, but intending to injure and aggrieve the plaintiff in his reversionary estate and interest of and in the said yard and the said part of the said wall, heretofore and whilst the said yard and the said part of the said wall were so in the possession and occupation of Frisk as tenant of the plaintiff, and whilst the plaintiff was so interested therein as aforesaid, to wit, on, &c. and on divers other days and times between that day and the day of exhibiting this bill, at, &c. wrongfully, injuriously, and without leave and against the will of the plaintiff, erected, put, and placed upon the said part of the said wall divers large quantities of brick and mortar and other materials, and thereby raised the said part of the wall to a great height, to wit, the height of three feet more than the same had been before that time, and also put and placed divers pieces of wood and timber, and tiles upon the said wall overhanging the said yard, to wit, at, &c.; by reason whereof, &c. After verdict for the plaintiff on the general issue, with 1s. damages, a motion was made in arrest of judgment: against which Jervis and Comyn shewed cause, and Lawes was heard in support of it, on a former day in this term.

Lord ELLENBOROUGH, C. J.,[14] on this day delivered the judgment of the Court. This was an action by a reversioner for an injury done to a yard and part of a wall of which the reversion belonged to him, and the plaintiff obtained a verdict; but it not being alleged in the declaration that the acts done were to the damage of the plaintiff, as such reversioner, or that his reversionary estate and interest was thereby depreciated or lessened in value, the defendant obtained a rule nisi to arrest the judgment. The declaration contained only one count, and that count stated several facts which are ordinarily stated in declarations of trespass, as mere injuries to the possession, viz., putting and placing upon part of a wall of the plaintiff quantities of

[14] Part of the opinion omitted.

brick and mortar, and thereby raising the same to a great height, and putting and placing pieces of timber, wood, and tiles upon the wall overhanging the said yard. The plaintiff also added, as consequential damage, "by reason whereof not only the said plaintiff during all the time aforesaid lost the use and advantage of his said part of the wall," (that is, sustained a temporary loss affecting the occupation and enjoyment thereof merely, which he had not, not being in possession,) "but also by means of the said wood, timber, and tiles so overhanging the said wall, large quantities of rain and moisture have from time to time during all the said time run and flowed from the top of the said wall upon the yard of the plaintiff, and the said yard and the said part of the wall have been greatly injured and damnified." And the question seems to be whether, in the absence of any such allegation as is usually, and (I believe) invariably made in declarations of this sort, that thereby the plaintiff's reversionary estate and interest in the premises were damaged or prejudiced, or lessened in value, we must infer that the water drip so described had a permanently injurious effect of this nature. It is not stated that the foundation of the wall was injured or undermined, or that the yard was more injured thereby as being wetted. The count does not import in terms that any act charged upon the defendant was injurious or to the damage of the plaintiff: the declaration does indeed contain the usual conclusion, "Wherefore the plaintiff saith he is injured and hath sustained damage, &c.:" but this is not matter of charge in the declaration, it is only the resulting inference of damage drawn by the plaintiff from the matter of charge; and unless the count, which is the matter of charge, warrants such inference it has no effect; and in truth, although this part of the declaration was brought under our notice, but little stress was laid upon it as a special allegation of damage in the argument. The main point relied upon was this, that after verdict the Court would infer that the plaintiff was confined at the trial to the proof of such an injury as would be prejudicial to the reversion, and that all evidence short of this effect must be supposed to have been excluded; and it was with a view to look into this point that the Court forebore giving its judgment at the time. Where a matter is so essentially necessary to be proved, that had it not been given in evidence, the jury could not have given such a verdict, there the want of stating that matter in express terms in a declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by a verdict; and where a general allegation must in fair construction so far require to be restricted, that no judge and no jury could have properly treated it in an unrestrained sense, it may reasonably be presumed after verdict, that it was so restrained at the trial; but unless the allegation is of such a nature that it would have been doing violence to the terms as applied to the subject matter, to have treated it as unrestrained, we are not aware of any authority which will

warrant us in presuming that it was considered as restrained merely because in the extreme latitude of the terms such a sense might be affixed to them. The rule by which we must go, must be one applicable to all actions, in inferior as well as superior courts; to cases in which the judge has no power to grant a new trial as well as to those in which there is such power; and to cases in which, if the jury do not think fit to follow the judge's direction, there is no power to correct their decision: and we must take care therefore not to extend the rule (if it has not been already extended further) beyond those cases in which we must presume the judge to have given a right direction, and the jury to have followed it. * * * As therefore there is no authority, upon which we can say we are warranted in presuming that the jury were confined to such injuries as would necessarily prejudice the reversion; as the charge in the declaration is conceived in such terms as to include injuries which are not necessarily prejudicial to it, but more aptly and naturally applied to injuries to the possession only; and as the plaintiff has not charged that the reversion was prejudiced, or that the plaintiff was damnified in respect thereof, we are not warranted in inferring that such a prejudice out of the natural and ordinary scope of the allegation must have been proved; and therefore the rule for arresting the judgment must be made absolute.[15]

DECLARATION IN CASE FOR INJURY TO AN EASEMENT.

(2 Chitty, Pleading [13th Am. Ed.] pp. *596, *807, *808.)

In the Common Pleas.

——— next after ——— in ——— Term, ——— Will. 4.

——— (to wit) C. D. was attached to answer A. B. of a plea of trespass on the case, and thereupon the said A. B. by E. F. his attorney, complains, for that whereas the said plaintiff, before and at the time of the committing of the grievances by the said defendant as hereinafter next mentioned, was, and from hence hitherto hath been, and still is, lawfully possessed of a certain messuage (and garden thereto belonging) with the appurtenances, situate and being in the parish of ——— in the county of ———. And by reason thereof, the said plaintiff, during all the time aforesaid, ought to have had, and still of right ought to have, a certain way from and out of the said (garden) unto, into, through, and over a certain (close), in the parish aforesaid, and from and out of the same, unto and into (a

[15] Injury to land: City v. McDonough, 112 Ill. 85, 1 N. E. 337 (1884) semble; Baker v. Sanderson, 3 Pick. (Mass.) 348 (1825) semble; Davis v. Jewett, 13 N. H. 88, 91 (1842); Potts v. Clarke, 20 N. J. Law, 536 (1845). Injury to easements: Dobson v. Blackmore, 9 A. & E. 991 (1847); Tinsman v. Railway, 25 N. J. Law, 255, 64 Am. Dec. 415 (1855); Patrick v. Ruffners, 2 Rob. (Va.) 220, 227, 40 Am. Dec. 740 (1843) semble. Accord.

certain wharf, or quay, of the said plaintiff in the parish aforesaid,) and so back again from the said (wharf, or quay,) unto and into, through, over, and along the said (close,) and from and out of the same into and unto the said (garden) of the said plaintiff for himself and his servants, on foot, to go, return, pass, and repass, every year and at all times of the year, at his and their free will and pleasure, as to the said messuage and garden, with the appurtenances of the said plaintiff belonging and appertaining. Yet the said defendant well knowing the premises, but wrongfully and unjustly contriving, and intending to injure the said plaintiff in that behalf, and to deprive him of the use and benefit of his said way, whilst the said plaintiff was so possessed of his said messuage (and garden,) with the appurtenances as aforesaid, to wit, on, &c. and on divers other days and times between that day and the day of exhibiting this bill, (or if in C. P. "the day of the commencement of this suit,") at, &c. (venue) aforesaid, wrongfully and injuriously placed and erected, and caused to be placed and erected, divers large quantities of boards, planks, and wood, and across the said way, and put and placed, and caused and procured to be put and placed, divers other large quantities of wood and timber in the said way, and kept and continued the said boards, planks, and wood, so placed and erected in and across the said way, as aforesaid, and also the said other wood and timber in the same way as aforesaid, for a long space of time, to wit, hitherto, and thereby during all the time aforesaid, the said way was and still is greatly obstructed and stopped up, and the said plaintiff by means thereof could not, during the time aforesaid, or any part thereof, nor can he now have or enjoy his said way, as he of right ought to have done, and otherwise might and would have done, and hath been and is, by means of the premises, deprived of the use, benefit, and advantage thereof, to wit, at &c. Wherefore the said plaintiff saith that he is injured, and hath sustained damage to the amount of £———., and therefore he brings his suit, &c.

GERBER v. GRABEL.

(Supreme Court of Illinois, 1854. 16 Ill. 217.)

The declaration averred, in the first count, that the plaintiff, before and at the time of the committing of the grievance thereinafter mentioned, was and still is, lawfully possessed of a certain messuage or dwelling-house, with the appurtenances, situate and being on, etc., in the town of Edwardsville, etc., in which, during all the time, etc., there were, and still of right ought to be, divers, to wit: two windows, through which the light and air, during all the time aforesaid ought to have entered, and still ought to enter, etc. Yet that the defendant, well knowing the premises, etc., contriving, etc., and to annoy him,

etc., therefore, to wit: on the first day of January, 1854, wrongfully and injuriously erected and raised, etc., a certain wall and building near to and against the said windows, and wrongfully, etc., kept the same erected for a long space of time, to wit: from the day and year aforesaid, hitherto. By means whereof, etc.

The other pleadings and proceedings are described in the opinion of the Court.

This cause was heard before Underwood, Judge, at October special term, 1854, of the Madison Circuit Court.

Scates, J.[16] This is an action on the case for obstructing and excluding the light and air from passing through the windows into the plaintiff's dwelling-house, situated on lot 127, in Edwardsville, by the erection of a wall and building, by the defendant, by which the house is rendered close, uncomfortable, unwholesome, and unfit for habitation, and plaintiff is greatly annoyed and incommoded in the use, possession and enjoyment. The second count is for continuing this obstruction; and the third count is general, for obstructing and excluding light and air, through the windows, without specifying the means.

Plea, not guilty; and verdict for plaintiff for $45. On motion, the court arrested the judgment, and gave judgment in favor of the defendant for costs.

There are two questions: one on the sufficiency of the pleadings, and the other on the existence of the right, under the common law of this State.

The declaration does not prescribe for ancient lights, but declares generally that plaintiff is possessed of the house, and has, and ought to, enjoy a right to the light and air through these windows. It is objected that this is insufficient.

In most of the early declarations for disturbance of lights, and for nuisances, a prescription was alleged. But at an early day this ancient rule of prescribing was relaxed, and by the modern rule, this declaration is sufficient to admit proofs of the right, whether it arise upon a prescription, by contract, or otherwise, by estoppel, etc. 1 Chit. Pl. 379, 381, 2; Sands v. Trefuses, 4 Cro. Car. 575; Cox v. Matthews, 1 Ventr. 237; St. Johns v. Moody, Id. 274; Penwarden v. Ching, 1 Mood. & Malk. 400 (22 Eng. C. L. R. 341); Hughes v. Keme, Yelv. 216, note 1; Coryton v. Lithebye, 2 Saund. 113, 114, and notes; Yard v. Ford, Id. 175; Story v. Adin, 12 Mass. 159, 7 Am. Dec. 46.

The old rule seemed to recognize a distinction between an owner of the land, and a mere trespasser; and that a prescription should be averred as to the former, while an allegation of possession in the plaintiff of the property injured, was good as to the latter, Yelv. 216, note 1; but no distinction is recognized in the modern rule.

[16] Part of the opinion omitted.

And we deem the general averments of possession and right, sufficient to admit proof of the true claim and interest. Legislation has conformed to these improvements in the rules of pleading, in the old possessory ejectment, now converted into a real action of title.

But in personal actions for injuries to the realty, this general mode of stating the right, does not extend to the plea or subsequent pleadings, for the party must show and prescribe in the que estate, 1 Chit. Pl. 382, until released by Stat. 2 and 3 Wm. IV, cap. 71, to which I shall have occasion more particularly to refer, in noticing the remaining question as to the right in this case. * * *

Judgment reversed.[17]

DECLARATION IN CASE FOR NEGLIGENCE.

(Encyclopedia of Forms. Forms No. 14,398, and No. 6,944.)

State of ———, } In the Circuit Court,
County of ———.} ——— Term, A. D. 18—.

———, the plaintiff in this case, complains of ———, the defendant, in an action of trespass on the case. For that the said defendant corporation, on the ——— day of ———, 18—, owned and was then operating a street railway in said ———, and then and there using its said business cars driven along the street by means of electricity; that, on said day, while the plaintiff was lawfully driving his team, consisting of his horse and road-cart to which his horse was properly harnessed, said horse, harness, and road-cart being then and there suitable and proper to be used by him, over and upon ——— Street, a public highway in said ——— whereon said defendant was then and there maintaining its track and operating and driving its cars as aforesaid, said plaintiff being then and there in the exercise of due and proper care and without negligence on his part, an electric car

[17] Anonymous, Cro. Car. 325 (1639); Rider v. Smith, 3 D. & E. 766 (1790); Bailiffs v. Diston, 6 East, 438, note a (1805); Parker v. Hotchkiss, 25 Conn. 321 (1856); Cushing v. Adams, 18 Pick. (Mass.) 110, 114 (1836: allegation of ownership of land to which easement appurtenant held good as equivalent to allegation of possession); Standiford v. Goudy, 6 W. Va. 364 (1873). Accord. See, also, 2 Williams' Saunders Rep. 113 a, note 1; Id. 172, note 1; 21 Pl. & Pr. 912.

In Smith v. Wiggin, 51 N. H. 156 (1871), it was said that an allegation alone that plaintiff had a right to the easement would be good.

Where the right, though intangible, is not appurtenant to land a simple allegation that plaintiff has the right, describing it, is sufficient. Dent v. Oliver, Cro. Jac. 43 (1605); Chapman v. Flexman, 2 Ventr. 291 (1698); Smith v. Wiggin, 51 N. H. 156 (1871); Patrick v. Ruffners, 2 Rob. (Va.) 220, 226, 40 Am. Dec. 740 (1843).

Where the plaintiff's interest in the right is reversionary that should appear. Patrick v. Ruffners, 2 Rob. (Va.) 220, 227, 40 Am. Dec. 740 (1843).

The act by which the defendant violated the right must be stated. Maenner v. Carroll, 46 Md. 193, 214 (1876).

of the defendant, then and there managed, controlled, directed, governed, and operated by the servants and agents of the defendant, said car being then and there propelled by the defendant at a rate of speed greatly in excess of the maximum rate of speed prescribed by law and the ordinances of the city of ——— in such case made and provided, and in violation of said ordinances, was then and there negligently, carelessly and at an undue, unreasonable, dangerous and unlawful rate of speed driven by the said defendant against the road-cart containing the plaintiff, so that the plaintiff was then and there thrown suddenly and with great force and violence from his seat down upon the ground and upon the track of the defendant, was stunned by the fall, his right hand run over by the wheel of said car, his body bruised and jammed, his leg and body severely burned by the electric current, and he then and there sustained other great and painful bodily injuries, external and internal; in consequence of which he suffered greatly in body and mind, was compelled to have his said right hand amputated, to submit to a long course of medical and surgical treatment for his recovery from said injuries, and put to great expense for medicine, medical attendance, and nursing, and has been otherwise greatly damaged, to the plaintiff's damage ——— dollars.

ENSLEY RY. CO. v. CHEWNING.

(Supreme Court of Alabama, 1890. 93 Ala. 24, 9 South. 458.)

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

CLOPTON, J.[18] The defect in the first count of the complaint assigned as cause of demurrer consists in the omission to state facts showing a duty owing by defendant to plaintiff, and its negligent performance. After stating that defendant was engaged in the business of a common carrier of passengers, propelling cars by steam, the count avers, generally, that the company "did, through its agents and servants, so carelessly, negligently, and improperly propel and drive an engine and train, so being used by said defendant, that by and through the carelessness, negligence, and improper conduct of the said defendant, by its agents and servants, the engine and train, so being propelled and driven as aforesaid, ran against plaintiff with great force and violence," knocking him down, and injuring him, as therein stated. For aught that appears from the count, plaintiff may have been a passenger, or an employé, or a mere trespasser. Admitting of more than one construction, that least favorable to plaintiff will be adopted.

While it has been said that the Code forms of pleading consist of general allegations of legal conclusions, rather than a statement of

[18] Statement of facts and part of opinion omitted.

the particular facts which will support them, and though the statute requires that "all pleadings must be as brief as is consistent with perspicuity, and the presentation of the facts or matter to be put in issue in intelligible form, * * * yet the facts must be so presented that a material issue in law or fact can be taken by the adverse party thereon." Code, § 2664. Ordinarily, the rules of good pleading require that the facts from which the conclusion of negligence is deducible should be averred, not mere conclusions of law. City Council v. Gilmer, 33 Ala. 116, 70 Am. Dec. 562; Insurance Co. v. Moog, 78 Ala. 284, 56 Am. Dec. 31. This rule has been relaxed, from necessity, in cases where the cause of action consists in the non-performance or misperformance of a duty. In such cases the rule has been thus stated: "When the gravamen of the action is the alleged nonfeasance or misfeasance of another, as a general rule it is sufficient if the complaint aver facts out of which the duty to act springs, and that the defendant negligently failed to do and perform, etc.; not necessary to define the quo modo, or to specify the particular acts of diligence he should have employed in the performance of such duty." The reason given is: "What the defendant did, and how he did it, and what he failed to do, are generally better known to the defendant than to the plaintiff; and hence it is that in such cases a general form of averment is sufficient." Leach v. Bush, 57 Ala. 145. Under the rule as thus stated, a general averment of the negligence has been held sufficient, when the complaint averred that the plaintiff sustained the relation of passenger to the railroad company, or was an infant of tender years, not capable of contributory negligence, or that the injury was to stock. Railroad Co. v. Jones, 83 Ala. 376, 3 South. 902; Railway Co. v. Crenshaw, 65 Ala. 566; Railroad Co. v. Thompson, 62 Ala. 494. The statement of either of the foregoing facts has been regarded as a sufficient averment of facts, showing the duty to act; but in no case, except in Railroad Co. v. Waller, 48 Ala. 459, has a general averment of simple negligence been held sufficient when not accompanied by an averment of facts from which the duty originates. In that case the death of plaintiff's intestate resulted from a collision. The complaint, as in this case, did not state that the decedent was a passenger or employé, or had any connection with the railroad company. The ruling that the complaint contained a proper statement of facts was based on the erroneous principle that the collision itself, and the consequent death of plaintiff's intestate were facts sufficient to create a presumption of negligence, for which the defendant was responsible. Under our decisions, a trespasser cannot maintain an action against a railroad company for injuries sustained while trespassing on its road-bed, unless such injuries were caused by reckless, wanton, or intentional negligence. If a complaint affirmatively shows that the plaintiff is a trespasser, an actionable injury is not shown, unless alleged to have been caused recklessly, wantonly, or intentionally. The presumption of negligence of such charac-

ter and degree does not arise from the mere fact of injury to a trespasser. The count, failing to aver any relation or connection between plaintiff and defendant which creates the duty to use the highest degree of care, should therefore be construed as if he were an intruder. It may be that, had the count averred the engine and train were run against plaintiff by reckless, wanton, or intentional negligence, it would have been held sufficiently certain—comporting with our system of pleading—though no special acts or omissions constituting the negligence were averred. But when, in such case, the complaint avers simple negligence, it is insufficient, the same as if it had affirmatively shown that plaintiff was a trespasser.

Neither can the doctrine of error without injury be applied when the defendant is compelled to take issue on an insufficient count; especially in view of the fact that the court refused to instruct the jury that plaintiff could not recover under the defective count. * * *

Reversed and remanded.[19]

SOUTHERN EXPRESS CO. v. McVEIGH.

(Court of Appeals of Virginia, 1871. 20 Grat. 264.)

In December, 1866, Wm. N. McVeigh instituted an action in the Circuit Court of Richmond against the Southern Express Company. The declaration contained four counts. The first count set out that the defendants were a corporation doing business in the States of Georgia, North Carolina and Virginia. That they were common carriers, and were engaged in carrying goods and merchandise, for hire, to and from places within said States, and particularly from the town of Charlotte, in North Carolina, to the city of Richmond, in Virgina. And that, on the 25th of November, 1864, the plaintiff was desirous of forwarding and having conveyed from the said town of Charlotte, to the city of Richmond, certain goods, viz: &c., of the value of $200,000. And that on the 24th of November the plaintiff

[19] Brown v. Mallet, 5 C. B. 599, 616 (1848); Hewison v. City, 34 Conn. 136, 91 Am. Dec. 718 (1867: wrongful death); World's Exposition v. France, 91 Fed. 64, 70, 33 C. C. A. 333 (1898: Illinois law); Mackey v. Mill Co., 210 Ill. 115, 71 N. E. 448 (1904: master and servant); Maenner v. Carroll, 46 Md. 193, 212 (1876); Cristanelli v. Mining Co., 154 Mich. 423, 117 N. W. 910 (1908: master and servant) semble; Breese v. Railroad Co., 52 N. J. Law, 250, 19 Atl. 204 (1890: carrier); Hess v. Lupton, 7 Ohio, 216 (1835); Edwards v. Brayton, 25 R. I. 597, 57 Atl. 784 (1904); Whitelaw v. Railway, 84 Tenn. 391, 1 S. W. 37 (1886: master and servant); Kennedy v. Morgan, 57 Vt. 46 (1885); Hortenstein v. Railroad Co., 102 Va. 914, 47 S. E. 996 (1904: wrongful death). Accord. The following earlier cases contra in Alabama and Virginia have been overruled: Ala. Co. v. Waller, 48 Ala. 459 (1872); Balt. & Ohio R. R. v. Sherman's Adm'x, 30 Grat. (Va.) 602 (1878); Birckhead v. Railway Co., 95 Va. 648, 29 S. E. 678 (1898). For many other citations see 29 Cyc. 566; 14 Pl. & Pr. 331.

It is well settled, on principles to be hereafter discussed, that an allegation that one owes a stated duty is an allegation of law and worthless; the facts creating the duty must be alleged. 14 Pl. & Pr. 332; 29 Cyc. 567.

delivered to the defendants, they being common carriers, at a certain place in the town of Charlotte, being the place used by them in the way of their business as common carriers, for the receipt of parcels and goods to be by them carried and conveyed as such common carriers, the said goods and merchandise, to be by the defendants carried and conveyed from the town of Charlotte to the city of Richmond, to be delivered by the defendants for the plaintiff, for certain reward to the defendants. Yet the said defendants, not regarding, &c., did not take proper care of the same but took such bad care of them that the goods were destroyed by fire at Charlotte.

The second count sets out that on the 25th of November, 1864, at the town of Charlotte, the plaintiff caused to be delivered to the defendant certain goods, viz: &c., of the value of $200,000, to be taken care of and safely carried and conveyed by them from Charlotte to Richmond, and at Richmond to be safely delivered by the defendants for the plaintiff, within a reasonable time then next following, for certain hire and reward: and although the defendants accepted the said goods for the purpose aforesaid, and undertook the carriage, conveyance and delivery as aforesaid, within such reasonable time; and, though such reasonable time hath long since elapsed, yet the defendants, not regarding their duty, &c., but contriving, &c., did not nor would, within such reasonable time, or at any time afterwards, take care of or safely carry the said goods from Charlotte to Richmond, nor deliver the same at Richmond for the plaintiff; but had neglected and refused so to do; and by reason of the negligence and improper conduct of the defendants, the goods were not delivered to or for the plaintiff at Richmond or elsewhere, and are wholly lost to the plaintiff at the said town of Charlotte.

The third count sets out, that on the 25th of November, 1864, at the town of Charlotte, the plaintiff did present to the defendants a list in writing of certain goods then about to arrive at the depot of the Charlotte and South Carolina Railroad Company, in the town of Charlotte, to wit, &c., of the value of $200,000, which the plaintiff was desirous to have conveyed and carried to Richmond and delivered to the plaintiff; and the defendants did then and there undertake to remove and deposit said goods in their warehouse as soon as possible on arrival of the goods at the town of Charlotte, to wit: at the said depot, and to carry them from Charlotte to Richmond within a reasonable time, for certain hire and reward to the defendants. And the plaintiff, on the 25th of November, 1864, at Charlotte, did pay to the defendants the sum demanded by them of him as reward for freight and insurance of said goods, to wit: the sum of $5,623.50, and the defendants then and there did give a receipt in writing for said money received for freight and insurance. And the plaintiff avers that the said goods afterwards, viz: on the 26th of November, 1864, arrived in Charlotte, viz: at the depot of the Charlotte and South Carolina Railroad Company, therein situate, and were

ready for removal by the defendants, and that the defendants had due notice of the same. Yet the defendants, not regarding their duty in that behalf, but contriving, &c., did not nor would, on the arrival of the goods at Charlotte, nor at any time afterwards, remove said goods from the said depot and deposite the same in their warehouse and carry them to Richmond, and there deliver the same to the plaintiff, but wholly neglected and refused so to do. And by means of the negligence and improper conduct of the defendants, the said goods have not been delivered to or for the plaintiff at Richmond or elsewhere, and are wholly lost to the plaintiff.

The fourth count sets out that on the 25th of November, 1864, the defendants were expressmen and forwarders of goods engaged in the business of receiving and forwarding, for those who might offer them, for a reward, goods and merchandize, and the like, from Charlotte to Richmond, and the course and usage of their business was, when requested by their owners, to receive such things destined for Richmond of the Charlotte and South Carolina Railroad Company at their depot in Charlotte, and forward the same to Richmond, storing them in their warehouse in the town of Charlotte until they could be sent off, when there was delay in sending them off by the railroads connecting Charlotte and Richmond, in cars of the said railroad, the use of which for that purpose was allowed to the defendants by agreement between them and the said railroad companies, the defendants receiving of the shippers entire cost and charges of such transportation from Charlotte to Richmond, so that the latter had nothing to pay for the same to the said railroad companies; and also receiving, when agreed on, of the shippers, in addition to the charges of transportation, a price for insurance of the articles shipped against loss or damage arising from the dangers of railroad transportation, fire, &c. The contract for receiving, storing and carrying the goods, and the arrival of the goods at the railroad depot in Charlotte, is set out as in the third count, except that it charges that the defendants undertook to insure the goods against damage by fire, &c., for a reward; and it avers that the plaintiff had given orders to the railroad company to deliver the goods to the defendants when they might demand the same. And the conclusion of the count is the same, except that it avers that the goods were lost at Charlotte by a fire, which consumed them in the warehouse of the Charlotte and South Carolina Railroad Company.

The defendants appeared and demurred generally to the declaration and each count thereof; but the demurrer was overruled by the court.

ANDERSON, J.,[20] delivered the opinion of the court.

This is an action on the case against an express company. There are four counts in the declaration. The first is the usual count in

[20] Statement of facts abridged and part of opinion omitted.

case against a common carrier. The other counts, the plaintiffs in error contend, are in assumpsit, and therefore improperly joined with the first count in case for tort. The question is raised by a general demurrer to the declaration, and to each count thereof, which was overruled by the Circuit Court. This is the first error assigned.

The first count is properly conceded to be in case for tort. If the other counts are not in tort, the declaration is clearly bad for misjoinder, and the demurrer well taken.

It is contended for the defendants in error, that all the counts are properly in case, and that consequently the demurrer was rightly overruled. The case has been elaborately argued, and much learning evolved upon the interesting question. I have carefully looked into nearly all the numerous cases cited, as well as others. To state and go through them all would be tedious and unnecessary. Whatever else may be drawn from them (which it is not necessary now to inquire), I think the following conclusions, which have an important bearing upon the case in hand, are clearly deducible: First, that an action on the case lies against a party who has a public employment —as, for example, a common carrier or other bailee, for a breach of duty, which the law implies from his employment or general relation. This is not disputed. And second, that where there is a public employment, from which arises a common law duty, an action may be brought in tort, although the breach of duty assigned is the doing or not doing of something, contrary to an agreement made in the course of such employment, by the party on whom such general duty is imposed. * * *

For the appellee it is claimed that all the counts proceed against the defendants as common carriers. Let us see whether the second, third and fourth counts proceed against them in that character. The fourth count, as well as the first, sets out the public character of the defendants, substantially, as common carriers. They are described as expressmen and forwarders, engaged in receiving goods from those who might offer them, and transporting them for reward from Charlotte, North Carolina, to Richmond, Virginia, in cars of the railroads, the use of which was allowed to them by agreement between them and the railroad companies; the defendants receiving from the shippers entire costs and charges of such transportation; so that the shippers had nothing to pay to the railroad companies for transportation. It is true that in this description of the character and relation of the defendants, they are not expressly alleged to be common carriers. But the facts set out constitute them to be such in law. 2 Redf. on Railw. p. 16; Southern Express Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783. An express company is to be regarded as a common carrier, and its responsibilities for the safe delivery of the property entrusted to it, is the same as that of the carrier. Belger v. Dinsmore, 51 Barb. (N. Y.) 69. Numerous other cases might be cited, but more are not needed.

The second and third counts do not set out the character of the defendants as common carriers. Held, on general demurrer, not to be necessary. Pozzi v. Shipton, 8 Adol. & El. 574. But they are sued as an express company, which is prima facie a common carrier. Redf. on Carriers, p. 45, § 58. And they are consequently, as such, declared against in all the counts.[21]

The question now arises, do the facts, as set out in the declaration, which upon demurrer must be taken to be true, show that the goods were delivered to the defendants, so as to charge them as carriers? The first and second counts expressly allege a delivery of the goods to the defendants. According to the third and fourth counts, an actual delivery was not made. But the goods were delivered at the place where the defendants agreed to receive them. And the defendants had due notice of their delivery at that place. Does this constitute in law a delivery to them in their public character of carriers?[22] * * *

As common carriers, then, the defendants were liable for the safe delivery of the goods to the plaintiff at Richmond, and were insurers, independently of their express agreement: and consequently the action against them is properly conceived in case.

But it is contended for the plaintiffs in error, that the second, third and fourth counts do not proceed in case, but are in assumpsit, because they do not aver a duty, or a breach thereof. It is true that they do not aver, totidem verbis, the duty of the defendants. But they aver facts, from which the law infers a duty, which is all that is necessary.[23] Lancaster Canal Co. v. Parnaby, 39 Eng. C. L. R. 54. Each of them sets forth facts, from which the law infers a duty; and then, averring that the defendants not regarding their said duty, assigns the breach. The court is, therefore, of opinion, that each count in this declaration contains allegations sufficient to support it in case. And though they may be sufficient in assumpsit, as in Church v. Mumford, 11 John. (N. Y.) 480, they are nevertheless good in case; and that, therefore, the court below did right to overrule the demurrer. * * *

Judgment affirmed.[24]

[21] B. & O. R. R. v. Morehead, 5 W. Va. 293, 299 (1872). Accord.

[22] The court held that it does.

[23] Wright v. McKee, 37 Vt. 161, 164 (1864). The rule is the same as to negligence generally. Brown v. Mallet, 5 C. B. 599, 615 (1848) semble; City v. Breed, 30 Conn. 535, 551 (1862). Also as to wrongful death actions. Brothers' Adm'r v. Railroad Co., 71 Vt. 48, 42 Atl. 980 (1898).

[24] An allegation that the defendant is a common carrier is necessary. Pozzi v. Shipton, 8 A. & E. 963, 974 (1838) semble; L. & N. R. Co. v. Gerson, 102 Ala. 409, 14 South. 873 (1893) semble.

An allegation that the defendant received the goods is necessary. Max v. Roberts, 12 East, 89 (1810); Sommerville v. Merrill, 1 Port. (Ala.) 107 (1834); North Co. v. Liddicoat, 99 Ala. 545, 551, 13 South. 18 (1892); Barger v. St. R. Co., 54 Ill. App. 284 (1894); Breese v. Railroad Co., 52 N. J. Law, 250, 19 Atl. 204 (1890).

O'REILLY v. NEW YORK & N. E. R. CO.

(Supreme Court of Rhode Island, 1889. 16 R. I. 388, 17 Atl. 906, 5 L. R. A. 364.)

On demurrer to the declaration.

DURFEE, C. J. The declaration contains two counts, which are severally demurred to. The cause of action set forth in the first count is an injury to the plaintiff's intestate resulting from the negligence of the defendant corporation. The injury was caused by collision between a locomotive with train of cars, running on the defendant's railroad, and a buggy, in which the intestate was driving along a common highway across said railroad at grade, at a place alleged to be in the commonwealth of Massachusetts. The count alleges that the intestate was greatly injured, her limbs broken, and that after much suffering she died. The plaintiff sues for $30,000 damages. The count is in form a count in an action of trespass on the case at common law, but it does not allege that the action survives in Massachusetts under any law or statute of that state; and the defendant contends that, without such allegation, the count is bad, since it does not survive at common law, and, if it survives under any statute of that state, the existence of the statute must be pleaded like any other fact which is essential to the maintenance of the action, inasmuch as, being the statute of another state, the court will not take judicial notice of it. We think the point is well taken. The cause of action accrued in Massachusetts under and in virtue of the law in force there, and if under the law of that state the action no longer exists there it no longer exists here.

Demurrer sustained.[25]

WESTCOTT v. CENTRAL VERMONT R. CO.

(Supreme Court of Vermont, 1889. 61 Vt. 438, 17 Atl. 745.)

This was an action of trespass on the case, brought by the plaintiff as administratrix of the estate of Samuel S. Westcott, against the defendant, for its tortious act resulting in the death of the in-

[25] Chicago R. R. v. Schroeder, 18 Ill. App. 328 (1885) semble; Nashville Co. v. Sprayberry, 9 Heisk. (Tenn.) 852 (1872) semble; Hobbs v. Railroad, 9 Heisk. (Tenn.) 873 (1872) semble. Accord. See, also, 5 Pl. & Pr. 867.

But it does not seem to be necessary to allege where the facts arose. Hobbs v. Railroad Co., 9 Heisk. (Tenn.) 873, 879 (1872).

A plea that death occurred in another state is good. State v. Railroad Co., 45 Md. 41 (1876); Nashville Co. v. Eakin, 6 Cold. (Tenn.) 582 (1869).

Obviously, if the statute is domestic, it need not be alleged. Westcott v. Railroad Co., 61 Vt. 438, 441, 17 Atl. 745 (1889) semble. Accord. So. Ry. v. Hansbrough, 105 Va. 527, 54 S. E. 17 (1906: speed regulation ordinance which made defendant's act wrongful). Contra. Domestic statutes, generally, need not be alleged. Kansas Co. v. Flippo, 138 Ala. 487, 498, 35 South. 457 (1903); Town v. Gallup, 22 Conn. 208 (1852); 20 Pl. & Pr. 594.

testate. The defendant demurred generally to the plaintiff's declaration. The court sustained the demurrer, and adjudged the declaration insufficient, to which the plaintiff excepted. The following is so much of the writ and declaration as is material to an understanding of the questions raised and decided: "By the authority of the state of Vermont, you are hereby commanded to attach, * * * then and there to answer unto Addie C. Westcott, of Waterbury in the county of Washington, administratrix of the estate of Samuel S. Westcott, late of Burlington, aforesaid, deceased leaving a widow and one minor child, as such administratrix, whose letters," etc. Then follow the usual averments of liability on the part of the defendant, but without any reference at all to the capacity in which the administratrix sues, or for whose benefit, or for what purpose the suit is brought; concluding in these terms: "By means of which improper and unlawful acts and neglects of the said defendant the car in which the said Westcott was so riding and being transported was violently thrown from said railroad track, and he was thereby then and there killed, to the damage of the plaintiff, (as such administratrix,) as she says, $20,000." At a subsequent term of court the plaintiff filed an additional count, substantially like the one contained in the writ, but concluding in these words: "By means of all which improper acts and neglects of the said defendant the car in which the said Westcott was so being transported was violently thrown from the railroad track, and he was thereby then and there, and within two years before the commencement of this suit, killed, leaving a widow and next of kin surviving."

TAFT, J. When the death of a person results from the tortious act or neglect of another, two rights of action may arise,—one to recover damages sustained by the deceased at the time of or after the injury and prior to his death; the other, to recover damages to the widow and next of kin. Both rights must be prosecuted in the name of the personal representative of the deceased. In this case it is insisted, under a general demurrer, that the declaration is defective in that it does not show for which cause of action the plaintiff is seeking to recover; the defendant claiming that it should be explicitly averred whether the action is brought for the benefit of the estate, or of the widow and next of kin. We think it should so appear from the declaration; and the question is, does it in the one under consideration? It is apparent that the substantial averments of the declaration in both cases must be the same, i. e., that the death of the intestate was caused, in this state, by the tortious act, neglect, or default of the defendant, and that the plaintiff is the personal representative of the deceased. If the declaration contained the above averments, it is sufficient, and under it a recovery can be had for any damages sustained by the deceased on account of the cause of action mentioned in R. L. §§ 2134, 2135. But when to the above averments is added the allegation that the intestate left a widow and next of kin, or either,

it sets forth a cause of action, under the subsequent sections 2138, 2139. Every fact which it is incumbent upon the plaintiff to prove is fully set forth in such a declaration. Why, then, is it not sufficient? It is only by force of the statute that an action for the benefit of the widow or next of kin can be maintained, and, in bringing it, the pleader could have recited the statute, counted upon it, or without referring to it in any manner, alleged these facts, which brought this case within the terms of it, stating those facts upon which the claim was sought to be maintained. Gould, Pl. c. 111, § 15, note 3. In respect of this question, which is made under points 1, 2, and 5 in the defendant's brief, we hold the declaration sufficient under sections 2138, 2139, to permit a recovery for the benefit of the widow and next of kin.

It is contended that there is no allegation that the deceased left a widow or next of kin; but the fact is otherwise. In the original writ the person killed is described as deceased, leaving a widow and one minor child. This part of the writ, although descriptive of the person, may be referred to to help out the want of a material averment in the declaration. Church v. Westminster, 45 Vt. 380. In the additional count it is alleged that Westcott was killed, leaving a widow and next of kin surviving. Such an allegation is undoubtedly necessary,[26] and in that respect both counts are sufficient. There is no allegation in the declaration that the widow and next of kin were living at the time the suit was brought; and the defendant insists that the declaration is defective for that reason. We think it depends upon whether the cause of action dies with the beneficiary. The statute provides that the action shall be brought in the name of the personal representative of the deceased, and that "the amount recovered shall be for the benefit of the wife and next of kin." The recovery being solely for their benefit, it necessarily follows that the action cannot be maintained if there are no such persons in existence; and, if it cannot be, then the allegation that there are such persons in existence at the time the suit is brought is necessary. For the want of such an allegation the declaration in this case is defective. Woodward v. Railway Co., 23 Wis. 400; State v. Railroad Co., 70 Md. 319, 17 Atl. 88. 26 a.

[26] Quincy Co. v. Hood, 77 Ill. 68, 72 (1875) semble; State v. Railway Co., 60 Me. 145, 151 (1872); Commonwealth v. Co., 5 Gray (Mass.) 473 (1855); Walker v. Railway Co., 104 Mich. 606, 617, 62 N. W. 1032 (1895) semble; State v. Gilmore, 24 N. H. 461, 469 (1852); Railroad v. Pitt, 91 Tenn. 86, 18 S. W. 118 (1891); B. & O. R. R. v. Gettle, 3 W. Va. 376, 383 (1869). Accord. Columbus Ry. v. Bradford, 86 Ala. 574, 580, 6 South. 90 (1888). Contra.

In a few states either originally or by a change in the statute the action survives for the benefit of the estate whether next of kin survive or not. Under such statutes an allegation of the survival of beneficiaries is of course unnecessary. B. & O. Ry. v. Wightman, 29 Grat. (Va.) 431, 437, 26 Am. Rep. 384 (1877); Searle v. Railway, 32 W. Va. 370, 9 S. E. 248 (1889) semble.

See, further, 5 Pl. & Pr. 868; 13 Cyc. 342.

The difficulties further suggested by the defendant's counsel in respect to being unable to defend the case, upon the ground that the elements of the damages are not sufficiently set forth, are not those caused by any defect in pleading, but such as can always be removed by suitable specifications, which all courts have full power to order. The English statute 9 & 10 Vict. requires no change in the ordinary mode of declaring for the injury, but requires the plaintiff to deliver with the declaration a "full particular of the person or persons for whom or in whose behalf the action is brought." In proceedings by indictment under analogous statutes it has been held that "it is sufficient if the administrator is named, and that it is alleged that the deceased has left heirs at law." Com. v. Railroad Co., 11 Cush. (Mass.) 512; Com. v. Railroad Co., 5 Gray (Mass.) 473; Com. v. Railroad Co., 121 Mass. 36; State v. Gilmore, 4 Fost. (N. H.) 461. In Railroad Co. v. Gettle, 3 W. Va. 376, it was held that the widow and next of kin should be accurately set forth and designated by name, and that the damages were claimed for their aid. There was no allegation that the deceased left a widow and kin, and the declaration was clearly defective; and, while the remarks of the judge may not have been obiter, they do not contain a correct statement of the law.

The strict rule of pleading insisted upon by the defendant's counsel would require an allegation of every fact which tends in the least degree to affect the amount of damages to which the plaintiff is entitled. Under what rule can it be consistently claimed that the residence of the beneficiary, the extent of his dependence, or his age, (although the latter facts might become very material in passing upon the question of damages,) should be alleged in the declaration? There is no rule requiring it. This latter point, if good law, could not avail the defendant under a general demurrer; a special demurrer only could reach it. An allegation that the intestate left a widow and next of kin, or either, and that they were living at the commencement of the suit, is all that is required in this respect. Judgment affirmed, with leave to replead.[27]

TYLER, J., being absent in county court, did not sit.

[27] Walker v. Co., 104 Mich. 606, 617, 62 N. W. 1032 (1895) semble; Geroux's Adm'r v. Graves, 62 Vt. 280, 19 Atl. 987 (1890) semble. Accord.
The names of the beneficiaries need not be stated. Conant v. Griffin, 48 Ill. 410 (1868); Commonwealth v. Corporation, 11 Cush. (Mass.) 512, 517 (1853); Hamilton v. Motor Co., 68 N. J. Law, 85, 52 Atl. 290 (1902). Accord. State v. Railway Co., 60 Me. 145, 151 (1872). Contra.

MAENNER v. CARROLL et al.

(Court of Appeals of Maryland, 1876. 46 Md. 193.)

ALVEY, J.,[28] delivered the opinion of the Court.

The declaration in this case contains ten counts; and to the third, fourth, fifth, sixth, seventh and eighth, the defendants demurred; and to the other counts there were pleas filed, and issues joined. The demurrers were sustained, and upon trial of the issues of fact a verdict was rendered for the defendants. The plaintiff has appealed, and we are now called upon to review the rulings of the Court below.

The third count, the first demurred to, alleges that the defendants were owners of a certain open and unenclosed lot of ground within the limits of the City of Baltimore, and that persons were in the habit of passing over the same; and that the defendants cut on such lot, in a dangerous and exposed portion thereof, a deep excavation, and left the same in a dangerous condition, and liable to injure persons passing over the said lot; and that the plaintiff, while passing over said lot, on a certain night, being ignorant of the excavation, fell therein and was injured.

This count entirely fails to state a sufficient cause of action. To constitute a good cause of action, in a case of this nature, there should be stated a right on the part of the plaintiff, a duty on the part of the defendants in respect to that right, and a breach of that duty by the defendants, whereby the plaintiff has suffered injury. Here there is nothing of the sort shown. All the facts alleged in this count may be true, and yet the plaintiff would have no right of action against the defendants. The fact that persons were in the habit of passing over the lot, gave to the plaintiff no right to do so; and unless there was such right there was no breach of duty on the part of the defendants in cutting and leaving open the excavation. A party has the right to use his land as he pleases, except as he may be restrained by duty to the public or to private individuals. * * *

As is stated in the plaintiff's brief, the fourth count differs from the third in alleging that there was a public highway across the lot, and that the defendants permitted a deep excavation to be cut over the lot and across this highway, and the plaintiff, while walking on the highway at night, fell into the excavation and was injured. And the fifth count differs from the fourth only in alleging that there was a roadway in public general use across said lot, instead of a public highway, as alleged in the fourth count. But, in considering the questions that arise on these counts, the difference mentioned may be treated as matter of form rather than substance, as by so doing the fifth count is taken in the most favorable sense to the plaintiff, which, under the well established rules for the construction of pleadings, is not allowed.

[28] Statement of facts and part of opinion omitted.

Now, it is certainly true, that every person who does or directs the doing of an act that will of necessity constitute or create a nuisance, is personally responsible for all the consequences resulting therefrom, whether such person be employer or contractor. Wilson v. Peto, 6 Moore, 49. And where, as in this case, a person is sought to be made responsible for a nuisance, not simply on the ground of his being the owner of the ground on which the nuisance exists, but because he has ordered or directed the doing of an act in a public highway which has created a nuisance, it is necessary that the act be alleged either as having been done or caused to be done by the defendant himself, or by others under his direction and authority. Addison on Torts, 197.

Here, the allegation is, not that the defendants cut the excavation, and left it in a condition dangerous to persons passing along the highway, but that they permitted others to do so. How permitted? The sufficiency of this allegation turns upon the word "permitted." In what particular sense it was used by the pleader is altogether uncertain. It may be, for aught that appears on the face of these counts, that the defendants permitted the excavation by their mere silence and failure to interfere, or by not taking active measures to prohibit the making of the excavation over the lot and across the highway. Where there is want of certainty in the allegation of a pleading, the general rule is, that the sense of the averment is to be taken most strongly against the pleader; Chit. Pl. 237, 238; and giving to the defendants the benefit of this rule, the counts under consideration fail to state a sufficient cause of action. Mere permission in the sense suggested, would not be sufficient to render the defendants liable, without something more. It does not follow that because the defendants are the owners of the lot that they are liable for all the nuisances that may be created thereon, no matter by whom. This is illustrated in the case of landlord and tenant. If a landlord demise premises which are not in themselves a nuisance, but may or may not become such, according to the manner in which they are used by the tenant, the landlord will not be liable for a nuisance created on the premises by the tenant. He is not responsible for enabling the tenant to commit a nuisance, if the latter should think proper to do so. Owings v. Jones, 9 Md. 108; Rich v. Basterfield, 4 C. B. 805, (56 E. C. L. 782). In such case, it may be said, in one sense, that the landlord permitted the tenant to create the nuisance, but not in such a sense as to render him liable. We think there can be no doubt of the correctness of the ruling of the Court below, in sustaining the demurrer to these counts. * * *

Judgment affirmed.[29]

[29] L. & N. Co. v. Lumber Co., 125 Ala. 237, 247, 28 South. 438, 50 L. R. A. 620 (1899) semble; King v. Railway Co., 1 Pennewill (Del.) 452, 41 Atl. 975 (1898: carrier); City v. Selz Co., 202 Ill. 545, 548, 67 N. E. 386 (1903); Marquette Co. v Marcott, 41 Mich. 433, 2 N. W. 795 (1879) semble; Grover v.

KING v. WILMINGTON & N. C. E. R. CO.

(Superior Court of Delaware, 1898. 1 Pennewill, 452, 41 Atl. 975.)

LORE, C. J., and SPRUANCE and GRUBB, JJ., sitting.

Superior Court, New Castle County, November Term, 1898.

Demurrer. Action on the case (No. 80, Sept. T. 1898). The facts appear in the opinion of the Court.

LORE, C. J. The plaintiff's declaration contains four counts for injuries, alleged to have been received by him, by having been thrown from one of the defendant's electric railroad cars, through the carelessness and negligence of the defendant.

The defendant demurs specially to each of the four counts of the plaintiff's declaration and relies upon the following causes of demurrer:

"1. For that it nowhere appears in the said declaration in what act or omission the defendant's negligence consisted.

"2. For that it nowhere appears in the said declaration that the railroad cars or appliances of the said defendant were improperly constructed, or that the same were out of repair, or that the same were in any manner defective or dangerous.

"3. For that it nowhere appears in the said declaration, that the said defendant had failed to provide competent and careful servants and agents, or in what respect its servants or agents had failed to exercise proper care and caution in the operation of the cars of the defendant.

"4. For that it nowhere appears in the said declaration, that the cars of the defendant were running at an improper or unlawful rate of speed.

"5. For that it nowhere appears in said declaration, upon what part of the road of the defendant the said plaintiff was injured, and the said defendant is uninformed of the time and place of said occurrence.

"6. For that the said defendant is not informed by said declaration upon what specific negligent act or omission the plaintiff relies for his right of recovery in this cause."

The substance of the demurrer therefore is, that the plaintiff has not set forth in his declaration the facts of his claim with sufficient certainty to apprise the defendant of what is intended to be proved.

The rule of pleading in cases of this character is quite clear. The plaintiff must set forth in his declaration the facts of his claim, with

Railroad, 76 N. J. Law, 237, 69 Atl. 1082 (1908: master and servant); Bucci v. Waterman, 25 R. I. 125, 54 Atl. 1059 (1903); Balt. R. R. v. Whittington, 30 Grat. (Va.) 805, 810 (1878: wrongful death); Snyder v. Electrical Co., 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922 (1897). Accord.

The act stated must be one which, if negligent, would be a breach of the duty alleged. Mathews v. Bensel, 51 N. J. Law, 30, 16 Atl. 195 (1888); Laforrest v. O'Driscoll, 26 R. I. 547, 553, 59 Atl. 923 (1905).

such certainty as reasonably to inform the defendant what is proposed to be proved in the case; so that the defendant may have a fair opportunity to meet such facts in preparing his defence.

It is the purpose of pleading to reasonably and fairly disclose the facts of the case and not to conceal them. Pleading should not be used as the means of concealing the facts by vague and general terms. Time, place and circumstances, so far as relied on and within the knowledge of the party, must be specified; and that, too, with reasonable fullness and fairness. Any other rule would make pleading the medium of concealing the facts of the case, except so far as might be necessary to bring it within the least possible legal certainty.

Chitty epitomizes the rule in this definition: "A declaration is the specification in methodical and legal form of the circumstances which constitute the plaintiff's cause of action." 2 Chitty's Pleading, 240.

It is not sufficient to state a mere conclusion of law.

It is not sufficient to state the result or conclusion of fact, arising from circumstances of the case not set forth in the declaration.

While some Western States have adopted a different rule, yet by the best considered cases, it is not sufficient merely to allege generally the negligence and carelessness of the defendant, without giving any particulars of such negligence, even in the case of passengers.

In the statement of facts in pleadings, Chitty announces a rule which practically solves this case. "A general statement of facts, which admits of almost any proof to sustain it is objectionable." 2 Chitty's Pleading, 231.

Applying these rules to the declaration in this case, we find that the second, third and fourth counts are sufficient.

The second count charges the defendant with "so negligently and carelessly omitting and neglecting to use proper care and caution in running one of its cars wherein the said plaintiff was then and there a passenger for hire, that said car ran from the rail with great force and violence," whereby the plaintiff was thrown out and injured.

The third charges the defendant with "negligently and carelessly running two cars, upon one of which the said plaintiff was then riding as a passenger for hire, upon a certain track, which was then and there through the negligence and carelessness of the said defendant improper and unsafe," whereby the car was thrown from the track and the plaintiff thereby thrown to the ground and injured.

The fourth count charges the defendant with "so negligently and carelessly running a certain car in which the plaintiff was then and there a passenger for hire and was then riding, that the said car jumped from the track," thereby causing the injury.

While the facts set forth in these three counts are meagre, yet they are sufficient in law, inasmuch as they specify circumstances relied on; such as the car ran from the rail from the negligent running of the defendant; the car was thrown from the track by reason of

an improper and unsafe track; that the car jumped from the track, by reason of the defendant's careless running. These specifications direct the defendant to the peculiar circumstances which are alleged to have caused the injury.

Applying the same test, the first count in the declaration is manifestly insufficient. It charges the defendant with "so negligently and carelessly operating a certain electric car which it was then and there running for the carriage of persons for hire, that thereby the said plaintiff, who was then and there a passenger on said car, was, through the negligence and carelessness of the said defendant as aforesaid," thrown from the car and injured.

This averment is simply the bald statement, that the defendant so negligently and carelessly operated a car that the plaintiff was thrown from the car and injured. Negligently operating a car, is a very general statement, involving a multitude of possible circumstances of negligence, with not one single fact or circumstance stated; which comes within Chitty's rule of admitting almost any proof to sustain it. It is more in the nature of a statement of a conclusion of fact, and contains none of the elements of good pleading. It gives the defendant no specific fact to meet or defend, but turns him loose among a multitude of possible causes of negligence coming within the term negligently operating a car.

The plaintiff justifies in part that the allegation of negligence is that contained in the form given in 2 Chitty, 650. Examination shows that this count is in marked contrast with the specific statement of fact contained in that form.

We do not mean to say that the plaintiff is always bound to set forth facts or circumstances, the knowledge of which is more properly or peculiarly in the opposite party, or to detail the circumstances minutely; but that such circumstances, as he does know and must have contemplated and relied on when he framed his declaration, and are reasonably necessary for the defendant's information, should be specified with reasonable certainty. To this he is unquestionably held by all the rules of good pleading.

The demurrer therefore to the first count is sustained. The demurrers to the second, third and fourth counts are overruled.[30]

[30] Jacksonville Ry. v. Garrison, 30 Fla. 557, 11 South. 929 (1892) semble; Chicago Ry. v. Harwood, 90 Ill. 425 (1878: wrongful death) semble; Great Western Co. v. Hawkins, 18 Mich. 427 (1869: carrier); Van Horn v. Central R. R., 38 N. J. Law, 133, 138 (1875: carrier); Ellis v. Waldron, 19 R. I. 369, 33 Atl. 869 (1896) semble; Balt. R. R. v. Whittington's Adm'r, 30 Grat. (Va.) 805, 810 (1878: wrongful death); Birckhead v. Railway Co., 95 Va. 648, 29 S. E. 678 (1898); Searle v. Railway Co., 32 W. Va. 370, 373, 9 S. E. 248 (1889: carrier); Snyder v. Co., 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922 (1897). Accord. Armstrong v. St. Ry. Co., 123 Ala. 233, 244, 26 South. 349 (1898); Connecting Ry. v. Railway Co., 123 Ill. 594, 600, 15 N. E. 45 (1888). Contra.

In New Jersey it is held that this defect is one of form only. Race v. Railroad Co., 62 N. J. Law, 536, 41 Atl. 710 (1898).

JACKSON v. CASTLE.

(Supreme Judicial Court of Maine, 1888. 80 Me. 119, 13 Atl. 49.)

On report from supreme judicial court, Waldo county.[31]

Action on the case to recover damages for injury to property sustained by reason of defendant's unlawful acts. The declaration is as follows: "In a plea of the case for that the plaintiff, to-wit, on the 15th day of December, A. D. 1884, at said Belfast, while in the exercise of his vocation, was then and there lawfully in and upon a certain public way in said city called 'Miller street,' with his two horses and sled, and that the said defendant and others, to the number of seven or more, were then and there sliding and coasting, with two or more sleds connected together, upon and down the sidewalk on said street, contrary to law, and then and there, within the limits of said street, made a loud noise by outcries and hallooing, contrary to law, and that, by reason of said sliding and loud noise, the horses of him, the said plaintiff, became frightened, and ran furiously down said street, and struck against a tree with such force that his sled and harnesses were broken, and one of said horses so much injured as to render him worthless, and that it was necessary to kill him, to the damage of said plaintiff, as he saith, the sum of three hundred dollars."

HASKELL, J. Does the plaintiff's declaration set out a cause of action? It charges in substance that the plaintiff, being lawfully in a public street with his two-horse team, suffered special damage in the loss of a horse by reason of both horses taking fright at the defendant's sliding in the same street with others engaged in boisterous outcries incident to their sport. Sliding in a street, accompanied with boisterous conduct, is not necessarily unlawful. Nor is it necessarily a public nuisance. The averment that defendant's acts were "contrary to law," does not help the plaintiff's case. It is merely a conclusion that he draws from the facts stated. If the facts do not warrant it, the court cannot adopt it. Sliding in a street, accompanied with boisterous conduct, calculated to frighten horses lawfully traveling therein, may be a public nuisance; but there is no such averment in the declaration. Sliding may be prohibited in streets by a city ordinance, and a violation of the same would be evidence tending to show negligence. If the plaintiff would recover, he must show negligence or unlawful conduct to be the proximate cause of his injury. Plaintiff nonsuit.[32]

PETERS, C. J., and WALTON, DANFORTH, LIBBEY, and EMERY, JJ., concurred.

[31] Under an agreement that if the declaration should be held insufficient the plaintiff should be nonsuited, otherwise the case to stand for trial.

[32] Mobile Co. v. Williams, 53 Ala. 595, 600 (1875); Mandeville v. Cookenderfer, Fed. Cas. No. 9,009 (1827: D. C.); Hart v. Club, 157 Ill. 9, 14, 41 N.

SNYDER v. WHEELING ELECTRICAL CO.

(Supreme Court of Appeals of West Virginia, 1897. 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922.)

Error to circuit court, Ohio county; Paull and Hervey, Judges.

Action by Florence Snyder against the Wheeling Electrical Company. Judgment for plaintiff. Defendant brings error. Reversed.

BRANNON, J.[33] In an action on the case, Florence Snyder, administratrix of Andrew C. Snyder, recovered a judgment against the Wheeling Electrical Company for $1,000, and the company obtained this writ of error.

One error alleged is the action of the circuit court in overruling a demurrer to the declaration. The specification of its defect is that it ought to, but does not, set forth the duty and aver the neglect; and citation is made of the language in the opinion in Clarke v. Railroad Co., 39 W. Va. 732, 20 S. E. 696, that a declaration in "tort must have requisite definiteness to inform the defendant of the nature of the cause of action, and the particular act or omission constituting the tort," and reference is made to Poling v. Railroad Co., 38 W. Va. 645, 18 S. E. 782, 24 L. R. A. 215, holding that a declaration for negligence "is good if it contain the substantial elements of a cause of action, the duty violated, the breach thereof properly averred, with such matters as are necessary to render the cause of action intelligible, so that judgment according to law and the very right of the case can be given." I think these statements are good law. Hogg, Pl. & Forms, § 140, says that it is settled as a general rule that it is not necessary to state the particular acts which constitute negligence. This is so, but we must take care not to misapply this statement. The West Virginia cases cited to sustain the rule are cases against railroads for killing stock. If a declaration allege that a railroad killed stock by negligently running a train over it, as in those cases, that would be sufficient, without more details of the circumstances of running over it; but I take it that it would not be enough simply to say that the company negligently killed a horse. You must aver the duty, and aver the existence or presence of negligence in its performance, and specify the act working damage, but need not detail all the evidential facts of negligence. You must tell the defendant, even under this general rule, that he negligently did a specific act doing harm. In other words, you may say that the defendant negligently did or did not do so and so, without detail as to the mere

E. 620, 29 L. R. A. 492, 48 Am. St. Rep. 298 (1895); Mackey v. Milling Co., 210 Ill. 115, 71 N. E. 448 (1904: master and servant); Flint Co. v. Stark, 38 Mich. 714, 717 (1878: carrier) semble; Cox v. Gas Co., 17 R. I. 199, 21 Atl. 344 (1891: master and servant). Accord. Taylor v. Felsing, 164 Ill. 331, 45 N. E. 161 (1896: master and servant); Ill. Steel Co. v. Ostrowski, 194 Ill. 376, 385, 62 N. E. 822 (1902: master and servant). Contra.

[33] Part of the opinion omitted.

negligence, but you must state the acts that are the basis of liability. If the negligence cannot be otherwise charged, they must be given. As said in Berns v. Coal Co., 27 W. Va. 285, 55 Am. Rep. 304, the object of a declaration is to give the facts constituting the cause of action, so they may be understood by the party who is to answer them, and by the jury and court, who are to give verdict and judgment on them; and though, in an action for negligence, it is not necessary to state with particularity the acts of omission or commission, yet, lest too loose a practice shall grow under this rule, it may be well to state the warning given in Railroad Co. v. Whittington, 30 Grat. (Va.) 810, that "this rule does not justify a general and indefinite mode of declaring, admitting of almost any proof." In that case it was held not enough to state that the railroad company was working its road with cars and conducted itself so negligently in its business that it inflicted severe bodily injuries. by reason of which the person died, without stating where the deceased was, or how injured. To avoid misunderstanding, it is important to add that the declaration need not state the particular facts that are not primary or main facts, but only are evidence of primary facts. When the necessary primary facts are given, then all other facts merely incidental that go to prove the primary facts may be proven without specification in the declaration. Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548; Ware v. Gay, 11 Pick. (Mass.) 106; McCauley v. Davidson, 10 Minn. 418, 422 (Gil. 335).

The declaration in this case states that the defendant operated an electric plant for the manufacture and sale of electricity, and had its wires over the streets of the city of Wheeling for the conveyance of electricity in dangerous currents, and that it was the duty of the defendant to exercise all possible care in putting up and operating its plant and wires, and constantly inspecting the wires and other appurtenances and appliances, and in seeing that they were strong, suitable, and safe, and that the wires and appurtenances were at all times safely secured, and to immediately attend to and repair broken or defective wires and appliances, and, when any of the wires were down upon the street, to cut off from them the current of electricity, that the lives and limbs of persons on the streets might not be endangered; yet the defendant carelessly and negligently suffered one of its wires at the corner of Market and Sixteenth streets to be so insufficiently secured that it came down, and lay on the street, and Snyder stepped upon it, received the electric current, fell prostrated by it, and continued to lie there, and receive the current into his body, and therefrom died. This declaration surely says that it was the duty of the defendant to safely secure the wires, and that, from being insufficiently secured, they came down into the street, and there wrought the injury. This one duty, breach, and injury save the declaration from demurrer. I think, too, the declaration may, by implication, be construed to say, what it should have positively aver-

red, that the defendant failed to cut off the current from the wire when down, as it avers that the current entered Snyder's body, and he fell, and continued to receive it, which could not be so had the current been cut off. "A declaration will be treated as alleging by implication every fact which can be implied from its averments by the most liberal intendment." Hogg, Pl. & Forms, § 140. Those were the only two omissions of duty specified. None other could be proven, for, even where there may be allowable a general charge of negligence, yet, if the declaration does give certain specifications of negligence as sources of the injury, others cannot be proven.[34] Hawker v. Railroad Co., 15 W. Va. 629, 36 Am. Rep. 825. Therefore evidence was not admissible to prove want of or bad insulation of wires at the place of accident and elsewhere, and that wires came in contact with wet posts, and that nobody was kept on duty to repair broken wires; that on a certain other occasion, when a wire was out of fix, some one telephoned from the plant that there was no one to fix the wires; that no instruments were kept to discover breaks; and that at other places the wires were bare. It might seem that some of this evidence might come in under the allegation of insecure fastening, but it relates more to the condition of the wires, not to their fastening, and there is no allegation of defective wires. * * *

Reversed.[35]

[34] Armstrong v. Co., 123 Ala. 233, 246, 26 South. 349 (1899: carrier) semble; Chicago R. R. v. Rayburn, 153 Ill. 290, 38 N. E. 558 (1894). Accord.

[35] Birmingham Co. v. Baker, 132 Ala. 507, 514, 31 South. 618 (1902); Anderson v. Hopkins, 91 Fed. 77, 33 C. C. A. 346 (1899: Ill. law); L. & N. R. R. v. Jones, 45 Fla. 407, 34 South. 246 (1903); City v. Selz Co., 202 Ill. 545, 67 N. E. 386 (1903); Chiles v. Drake, 2 Metc. (Ky.) 146, 74 Am. Dec. 406 (1859: wrongful death); Ware v. Gay, 11 Pick. (Mass.) 106, 110 (1831: carrier); Cristanelli v. Mining Co., 154 Mich. 423, 117 N. W. 910 (1908: master and servant); Breese v. Trenton Co., 52 N. J. Law, 250, 19 Atl. 204 (1890: carrier); Birckhead v. Railway Co., 95 Va. 648, 29 S. E. 678 (1898). Accord. Laporte v. Cook, 20 R. I. 261, 38 Atl. 700 (1897); So. Ry. v. Hansbrough's Adm'x, 105 Va. 527, 54 S. E. 17 (1906). Contra. For further citations see 14 Pl. & Pr. 333; 29 Cyc. 570.

In any event the declaration need allege only such evidence of negligence as the plaintiff would likely know. Chicago Co. v. Jennings, 157 Ill. 274, 280, 41 N. E. 629 (1895); Parker v. Steamboat Co., 17 R. I. 376, 22 Atl. 284, 23 Atl. 102, 14 L. R. A. 414, 33 Am. St. Rep. 869 (1891).

If facts showing negligence are alleged, an express allegation of negligence is unnecessary. Parnaby v. Company, 11 A. & E. 223, 242 (1839); Consumer's Co. v. Pryor, 44 Fla. 354, 379, 32 South. 797 (1902); Ill. Co. v. Ostrowski, 194 Ill. 376, 384, 62 N. E. 822 (1902).

If facts are alleged bringing the case within the doctrine of res ipsa loquitur, an allegation of negligence is unnecessary. Ellis v. Waldron, 19 R. I. 369, 371, 33 Atl. 869 (1896). Compare Greinke v. Railway, 234 Ill. 564, 85 N. E. 327 (1908).

McGANAHAN v. EAST ST. LOUIS & C. R. CO.

(Supreme Court of Illinois, 1874. 72 Ill. 557.)

Appeal from the Circuit Court of St. Clair county; the Hon. William H. Snyder, Judge, presiding.

Mr. Justice CRAIG delivered the opinion of the Court:

This was an action on the case, brought to recover damages for an injury received by the plaintiff in coupling cars of the defendant. A demurrer was filed to the declaration, which was sustained. The plaintiff brings the record here by appeal, and assigns for error the decision of the court in sustaining the demurrer.

The declaration contains but one count, in which it is averred that, on the 17th of March, 1873, the defendant employed the plaintiff as a brakeman, and that it was his duty to couple together the cars of defendant; that while he was so engaged, he received only ordinary wages, and did not assume any special risks, but only such as were ordinarily incident to such employment; that it was the duty of the defendant to furnish suitable cars and appliances, so as to enable him to perform his duty with safety; that the defendant did not furnish safe and suitable cars, but negligently furnished a car for the transportation of certain railroad iron, which was unsafe; that the car was much shorter than the iron, so that the iron projected over the ends of the car, thereby rendering it unsafe and dangerous to plaintiff while in the performance of his duty, all of which the defendant well knew; that while plaintiff was coupling two of defendant's cars, one of which was a box car, on its track, and the other was a rear car of a train attached to an engine of defendant, which engine and train were being backed up by defendant to be coupled to the box car, he necessarily had to go between the cars to couple them; that while his attention was wholly absorbed in watching the signals from the train, which was backing up, and while he was between the cars for the purpose of making the coupling, the cars came violently together, and while he was using all due care, and without fault or negligence on his part, without any knowledge or notice whatever that the iron bars were projecting over the end of the car at the time, etc., but by reason of the negligence of the defendant, he had his right hand caught between said cars, and thereby mangled and hurt, etc.

This declaration can not be held sufficient. The only act of negligence on the part of the defendant, of which the plaintiff seems, by his declaration, to complain, is, the car upon which the iron was loaded was too short, and the iron projected over the end of the car.

While this may be conceded to be an act of negligence on the part of the defendant, yet, unless this negligence of the defendant contributed, in some degree, to the injury received by plaintiff, then it certainly could be no ground of recovery.

The declaration does not aver that the plaintiff was injured by the iron projecting over the end of the car. The substance of the averment is, that the cars came violently together, and his hand was caught between the cars and injured while he was in the act of coupling the cars. For aught that we are able to perceive, this would as readily occur if no iron had been projecting over the end of the car.

The plaintiff entirely fails, by his declaration, to show that the injury received was occasioned by the negligence he attributes to the defendant. This objection to the declaration we regard as fatal.

The judgment of the circuit court will, therefore, be affirmed.

Judgment affirmed.[36]

CITY OF ORLANDO v. HEARD.

(Supreme Court of Florida, 1892. 29 Fla. 581, 11 South. 182.)

MABRY, J.[37] The appellee sued appellant in the circuit court of the seventh judicial circuit for Orange county for personal injuries received by reason of an alleged unsafe sidewalk. The action is trespass on the case. A trial of the case resulted in a verdict and judgment for appellee, and appellant has appealed to this court. In view of the conclusion reached it is unnecessary to give the proceedings in the case further than the action of the court on the demurrer to the declaration. The essential allegations of the declaration are that the defendant, the city of Orlando, "on the 3d day of January, A. D. 1887, was possessed and had control of certain public streets called 'Orange Avenue' and 'Church Street,' in the said city, in the county aforesaid, and ought to have kept the same in good and safe repair and condition, yet the defendant, not regarding its duty in that behalf,

[36] City v. Gilmer, 33 Ala. 116, 131, 70 Am. Dec. 562 (1858); Reaves v. Mills, 154 Ala. 565, 45 South. 702 (1908: master and servant); German-American Co. v. Brock, 55 Fla. 577, 46 South. 740 (1908); Strain v. Strain, 14 Ill. 368 (1853); Eilenberger v. Nelson, 64 Ill. App. 277 (1896); Paige Works v. Hutter, 107 Ill. App. 673 (1903: master and servant); State v. Fox, 79 Md. 514, 528, 29 Atl. 601, 24 L. R. A. 679, 47 Am. St. Rep. 424 (1894); Cristanelli v. Mining Co., 154 Mich. 423, 117 N. W. 910 (1908: master and servant) semble; Minnuci v. Railroad Co., 68 N. J. Law, 432, 53 Atl. 229 (1902: master and servant) semble. Accord.

But a general allegation, such as "by reason of," "caused," "in consequence of," is sufficient. American Co. v. Fennell, 158 Ala. 484, 48 South. 97 (1908); German-American Co. v. Brock, 55 Fla. 577, 46 South. 740 (1908); Cristanelli v. Mining Co., 154 Mich. 423, 117 N. W. 910 (1908: master and servant); Dingee v. Unrue's Adm'x, 98 Va. 247, 35 S. E. 794 (1900: master and servant). Accord. Wilson v. Railroad, 146 Ala. 285, 289, 40 South. 941, 8 L. R. A. (N. S.) 987 (1906: master and servant). Contra.

If the facts alleged show causation an express allegation is unnecessary. Birmingham Co. v. Hinton, 141 Ala. 606, 37 South. 635 (1904); Seal v. Cement Co., 108 Va. 806, 62 S. E. 795 (1908: master and servant). Accord.

In Greinke v. Railway, 234 Ill. 564, 85 N. E. 327 (1908: carrier), it appears to be held that, if on the facts alleged the doctrine of res ipsa loquitur applies, an allegation of causation is unnecessary.

[37] Part of the opinion omitted.

while it was so possessed, and had the control of the said sidewalks, to wit, on the day aforesaid, there wrongfully and negligently suffered the same to be and remain in bad and unsafe repair and condition, and divers of the planks wherewith the said sidewalk was laid to be and remain broken and unfastened, by means whereof the plaintiff, who was then and there passing along and upon the said sidewalk, then and there necessarily and unavoidably tripped and stumbled upon and against one of said broken and unfastened planks of said sidewalk, and was thereby thrown and fell to and upon the said sidewalk, and the ground there, and thereby the left leg of the plaintiff was then and there dislocated and broken, and he became sick, lame," etc.; and concluding with an allegation as to loss of time, suffering of pain, and the expending of divers sums of money to be healed, amounting in the aggregate of damages sustained to the sum of $15,000.

A demurrer to this declaration that it is bad in substance was overruled by the court.

Three objections are urged here against the sufficiency of this declaration: First, that it does not specifically set forth the place where the cause of action arose; second, that it does not allege that plaintiff was exercising due and ordinary care when the alleged injury was received; and, third, that there is no allegation in the declaration that the defendant corporation had any knowledge of the defective sidewalk, or that a sufficient time elapsed after the defect occurred, and before the injury, for it to repair the same. The first objection does not in our judgment present any sufficient reason why the demurrer should have been sustained. * * *

Neither do we think that the second objection urged here against the declaration is good. Some decisions hold that in actions against municipal corporations for injuries received by reason of defective streets or sidewalks it is necessary for the plaintiff to aver in his declaration that he was at the time exercising reasonable care, and the injury happened without his fault.[38] The decisions in Indiana are clear and pronounced in holding this view. In section 113, 1 Shear. & R. Neg., it is stated that the Indiana courts alone require the plaintiff expressly to aver in his pleading the fact of his due care, but early decisions in Illinois and Massachusetts seem to sanction this rule. Railroad Co. v. Hazzard, 26 Ill. 373; Raymond v. Lowell, 6 Cush. 524, 53 Am. Dec. 57. Where the burden is upon the plaintiff in the first instance to prove the want of negligence on his part,

[38] Chicago Ry. v. Cooney, 196 Ill. 466, 63 N. E. 1029 (1902) semble; State v. Railroad, 77 Md. 489, 26 Atl. 865 (1893: wrongful death); Kilberg v. Berry, 166 Mass. 488, 44 N. E. 603 (1896: master and servant) semble; Torongo v. Salliotte, 99 Mich. 41, 57 N. W. 1042 (1894: master and servant); Milliken v. City, 136 Mich. 250, 99 N. W. 7 (1904); Falk v. Railroad Co., 56 N. J. Law, 380, 29 Atl. 157 (1894: carrier) semble; Di Marcho v. Foundry, 18 R. I. 514, 27 Atl. 328, 28 Atl. 661 (1893) semble; Benedict v. Society, 74 Vt. 91, 103, 52 Atl. 110 (1901) semble. Accord.

contributing to the injury, it would seem that some reason might exist for the rule requiring an allegation of due care on his part, although Shearman & Redfield, in the section, supra, say in such cases the general rule is that the plaintiff need not expressly aver in his pleading the absence of contributory fault. And in the note to the section referred to it is stated no such averment is required in states where contributory negligence is a defense. There is a decided conflict of authority on the question of the burden of proof as to contributory negligence. The decisions cited to sections 156 and 157, Beach, Contrib. Neg., and on pages 1102, 1103, 1 Rice, Ev., clearly show this. In this state this question has been passed upon, and the rule announced, that contributory negligence on the part of the plaintiff is a matter of defense which the defendant must set up and maintain by proof, unless the plaintiff's own evidence in support of his case shows that a presumption of contributory negligence is plainly inferable therefrom. Railroad Co. v. Yniestra, 21 Fla. 700. Under this rule there would seem to be no good reason for requiring the plaintiff to negative in his declaration a defense which the defendant must set up and maintain by proof in the absence of such a showing by the plaintiff. This rule is the one best sustained by authority, and we think is correct. In Lee v. Gaslight Co., 98 N. Y. 115, it was decided that it is not essential that the complaint in an action for negligence shall allege absence of contributory negligence on the part of the plaintiff. Such an allegation is substantially involved in the averment that the injury complained of was occasioned by defendant's negligence.[39] The same view was maintained in Hoyt v. City of Hudson, 41 Wis. 105, 22 Am. Rep. 714. See, also, Hackford v. Railroad Co., 6 Lans. (N. Y.) 381; Smoot v. Mayor, etc., 24 Ala. 112; Robinson v. Railroad Co., 48 Cal. 409; Shear. & R. Neg. § 109. * * *

Ordered accordingly.[40]

[39] Gov't R. R. v. Hanlon, 53 Ala. 70 (1875); May v. Princeton, 11 Metc. (Mass.) 442 (1846); Hickman v. Railroad, 66 Miss. 154, 5 South. 225 (1888; wrongful death); Brothers' Adm'r v. Co., 71 Vt. 48, 42 Atl. 980 (1898). Accord.

[40] Watling v. Oastler, L. R. 6 Ex. 73, 78 (1871); Mobile Co. v. Crenshaw, 65 Ala. 566 (1880); Birmingham Co. v. Hilton, 141 Ala. 606, 37 South. 635 (1904); Atchison v. Wills, 21 App. Cas. (D. C.) 548, 562 (1903) semble; Cox v. Brackett, 41 Ill. 222 (1866); Chicago Ry. v. Coss, 73 Ill. 394 (1874) semble; Valley v. Railroad, 68 N. H. 546, 38 Atl. 383 (1896); Warshawsky v. Traction Co., 68 N. J. Law, 241, 52 Atl. 296 (1902); McKee v. McCardell, 21 R. I. 363, 43 Atl. 847 (1899); Sheff v. City, 16 W. Va. 307, 313 (1880); Winchester v. Carroll, 99 Va. 727, 738, 40 S. E. 37 (1901) semble. Accord.

The omission to allege freedom from contributory negligence is cured by verdict. Chicago Co. v. Cooney, 196 Ill. 466, 63 N. E. 1029 (1902); Benedict v. Society, 74 Vt. 91, 103, 52 Atl. 110 (1901).

Due care on plaintiff's part may be alleged in general terms. Ill. Central v. Weiland, 179 Ill. 609, 613, 54 N. E. 300 (1899); Falk v. Railroad, 56 N. J. Law, 380, 384, 29 Atl. 157 (1894) semble. Accord. Torongo v. Salliotte, 99 Mich. 41, 57 N. W. 1042 (1894). Contra.

If facts showing due care are alleged, an express allegation is unnecessary. Falk v. Railroad, 56 N. J. Law, 380, 384, 29 Atl. 157 (1894).

An allegation that defendant had the last chance to avoid the accident

LIBBY, McNEILL & LIBBY v. SCHERMAN.

(Supreme Court of Illinois, 1893. 146 Ill. 540, 34 N. E. 801, 37 Am. St. Rep. 191.)

Appeal from appellate court, first district.

Action on the case brought by Michael Scherman against Libby, McNeill & Libby. Plaintiff obtained judgment, which was affirmed by the appellate court. Defendant appeals. Affirmed.

The other facts fully appear in the following statement by BAILEY, C. J.:

This was an action on the case, brought by Michael Scherman against Libby, McNeill & Libby, a corporation, to recover damages for a personal injury. The declaration originally consisted of two counts, but the first count was dismissed, and the trial was had upon the second count alone. That count alleges that at the time of the injury complained of the defendant was possessed of and operated a packing house; that the plaintiff was in the defendant's employ as a laborer, and as such was working for the defendant, with all due care and caution for his safety, at and near a certain pile of pork barrels, which were piled in rows, one upon another, to a great height, to wit, 12 feet; "that it then and there became and was the duty of the defendant to keep and maintain said piles of barrels in such condition that they would not spread, tilt, or fall upon plaintiff while working for the defendant at and near the same and not to do anything with or to said piles of barrels which would cause them to spread, tilt, or fall upon the plaintiff while working at or near them, in the business of the defendant; yet the defendant, in utter disregard of its duty in this behalf, then and there carelessly and negligently kept and maintained said rows of barrels, defectively piled in rows one upon another, and, while so defectively piled, drove in the head of one of said barrels, and took therefrom the contents thereof, to wit, certain brine and pork, so that the said barrel was then and there greatly weakened and rendered unable to support the weight of the barrels, piled above the same, and by reason of the carelessness and negligence of defendant, in manner as aforesaid, and while plaintiff was in the exercise of all due care for his own safety, the said barrels spread, tilted, gave way, and fell upon and against the plaintiff," thereby breaking the plaintiff's leg, and otherwise injuring him. To this count the defendant pleaded not guilty, and at the trial the jury found the defendant guilty, and assessed the plaintiff's damages at $7,500. From this sum the plaintiff remitted

cures the failure to allege due care. Burke v. Railroad Co., 108 Ill. App. 565, 570 (1902).

See, generally, 29 Cyc. 575; 5 Pl. & Pr. 1.

$2,500, and the court, after denying the defendant's motion for a new trial, and also its motion in arrest of judgment, gave judgment in favor of the plaintiff for $5,000 and costs. That judgment, on appeal to the appellate court, was affirmed, and the present appeal is from the judgment of affirmance. * * *

BAILEY, C. J.[41] The first proposition submitted by counsel for the defendant is that the declaration does not state a cause of action, and that its motion in arrest of judgment should have been sustained on that ground. The contention is that the defendant, being a corporation, could act only by its agents and servants, and that as the maxim respondeat superior has no application to injuries resulting from the negligent acts of the fellow servants of the plaintiff, the declaration must show affirmatively, by express averments, that the injury complained of was caused by the negligent acts of agents or servants of the defendant who were not fellow servants of the plaintiff. This, in our opinion, was not necessary. The allegations of the declaration, so far as this point are concerned, are in the form which has been universally recognized by the rules of common-law pleading as sufficient to charge a corporation with negligence. They are that the defendant—that is, the corporation itself—negligently did the acts complained of; allegations which exclude, ex vi termini, the theory that they were performed by parties for whose conduct the defendant was not responsible. Counsel refer, in support of their contention, to the recent case of Steel Co. v. Shields, 134 Ill. 209, 25 N. E. 569. Upon examination of that case it will be found that the negligent acts complained of were there affirmatively alleged to have been done by the defendant's servants, without showing that they were done by the class of servants whose acts would charge the principal with responsibility. It was held that such allegations were not sufficient to show a right to recover against the principal.[42] The distinction between that case and this is clear. It should also be noticed that in that case the ordinary presumptions which obtain after verdict, and by operation of which a defective statement of a good cause of action is said to be cured, were excluded by an instruction given by the court to the jury. In this case no such instruction was given; so that, even if the declaration is one which might

[41] Statement of facts abridged and part of opinion omitted.

[42] L. & N. Ry. v. Bouldin, 110 Ala. 185, 199, 20 South. 325 (1895); Schillinger Co. v. Smith, 225 Ill. 74, 81, 80 N. E. 65 (1907) semble; Flynn v. City, 134 Mass. 351 (1883); Laporte v. Cook, 20 R. I. 261, 38 Atl. 700 (1897). Accord. Mott v. Railway, 102 Ill. App. 412 (1902) semble. Contra.

If the facts alleged show that plaintiff was not a fellow servant, no express allegation to that effect is necessary. Chicago Co. v. Swan, 176 Ill. 424, 52 N. E. 916 (1898).

If the declaration affirmatively shows that the plaintiff and the servant who did the injurious act were fellow servants, it must overcome that defense in some way. Zier v. Railway, 98 Md. 35, 56 Atl. 385 (1903).

have been held to be defective on demurrer, the defect is one which is cured by verdict. * * *

We find no material error in the record, and the judgment of the appellate court will accordingly be affirmed.[43]

DALTON v. RHODE ISLAND CO.

(Supreme Court of Rhode Island, 1904. 25 R. I. 574, 57 Atl. 383.)

Trespass on the case for negligence by George L. Dalton against the Rhode Island Company. On demurrer to declaration. Demurrer sustained.

Argued before STINESS, C. J., and DOUGLAS and BLODGETT, JJ.

STINESS, C. J. This case comes before us on defendant's demurrer to the declaration upon the ground that it does not appear that the defective condition of the pump complained of was unknown to the plaintiff, or that, with reasonable care and diligence, said plaintiff could not have known of such defective condition. The question is whether a declaration for negligence should state that the defect on which a cause of action is based was unknown to the plaintiff. The object of a declaration is to state the case against the defendant, and the office of a demurrer is to require a sufficient statement when the declaration is deficient. The reason for this is that a defendant should not be put to the trouble and expense of a trial, possibly by an irresponsible plaintiff, unless a case is stated upon which the plaintiff, prima facie, at least, has a right to recover. In negligence cases a plaintiff's right to recover is limited by his contributory negligence and by his assumed risks. It is now common practice to negative the limitation of contributory negligence by the allegation of due care on the part of the plaintiff. In regard to assumed risks, there is a difference of opinion whether this should be regarded as a matter of defense, or a fact to be negatived in the declaration. See 5 Ency. Pl. & Pr. p. 4. In this state it has been considered, in cases between master and servant, that, since a servant entering or continuing in service under a known risk cannot recover unless some sufficient excuse is shown, he does not state a case unless he

[43] Jacksonville Ry. v. Galvin, 29 Fla. 636, 11 South. 231, 16 L. R. A. 337 (1892); Fifield v. Railroad, 42 N. H. 225 (1860) semble. Accord. Fortin v. Manville Co. (C. C.) 128 Fed. 642 (1904: Rhode Island law); Di Marcho v. Foundry, 18 R. I. 514, 27 Atl. 328, 28 Atl. 661 (1893). Contra.

If the declaration charges the corporation with mere omission, the plaintiff need not show that he was not a fellow servant. Fifield v. Railroad, 42 N. H. 225 (1860); Laporte v. Cook, 20 R. I. 261, 38 Atl. 700 (1897).

A fortiori, if the suit is not against a corporation, the application of the fellow servant rule need not be negatived. Cribben v. Callaghan, 156 Ill. 549, 41 N. E. 178 (1895).

See, generally, 26 Cyc. 1394; 13 Pl. & Pr. 906.

shows that he had not assumed such risk, whereby he might be precluded from recovery. If want of knowledge need not be alleged by the plaintiff, it need not be proved by him. The result would be, therefore, in holding that it need not be alleged, that a plaintiff could put in his case without reference to his knowledge of the alleged defect, and the defendant, upon showing such knowledge, not excused, would be entitled to a verdict. This, however, occasions unnecessary hardship to a defendant, when the case might have been determined on the pleadings. It is no hard rule for a plaintiff to require the averment, for, if he cannot state that he was ignorant of the defect, it must be because he knew it; and, if he knew it, and was without excuse for continuing to work in the face of it, he is without right to recover. Such a question should be settled, as far as possible, on the pleadings. With due respect to courts holding otherwise, we are of opinion that the allegation of want of knowledge is essential to the statement of a case, as much as the averment of due care by the plaintiff, and is more consonant with proper pleading and the convenience of parties than to leave it to be set up in defense. If a plaintiff must negative contributory negligence, why should he not also negative an assumed risk which his silence apparently admits?

In Kelley v. Silver Spring, 12 R. I. 112, 34 Am. Rep. 615, the doctrine of assumed risks was fully settled, and has since been followed without question. Di Marcho v. Builders, 18 R. I. 514, 27 Atl. 328, 28 Atl. 661, held that the plaintiff must state the relation of the defendant and the agent causing the injury, so that it may appear whether he was a fellow servant or not. Flynn v. International Co., 24 R. I. 291, 52 Atl. 1089, held that a declaration failing to state that the plaintiff did not know of the defect complained of as negligence was demurrable. In that case an omission of the word "not" occurred in transcribing the opinion, which should have been inserted in the sixth line. The opinion would then have read, "If the plaintiff knew of the defect, he was working under a known risk; if he did not know of it, the court could not say that the defect was not obvious, and so charge him with notice, as claimed in the demurrer." The demurrer was therefore sustained, because the declaration left open one of two possibilities—either a known or an obvious risk, without negation or excuse. It is now urged that Lee v. Reliance Mills, 21 R. I. 322, 43 Atl. 536, is inconsistent with Flynn v. International Co. There is no conflict. As pointed out by Mr. Justice Tillinghast in Baumler v. Narragansett, 23 R. I. 430, 50 Atl. 841, the declaration in the Lee Case set up that while the deceased was "necessarily absorbed in the work of operating the machine, so that he was obliged to give his entire attention thereto, and to work with rapidity and promptness," he was injured. It impliedly admitted knowledge, and set up an excuse. The demurrer was on the ground that he might have been fully informed as to his surroundings.

Suppose he had been. That could not affect the case stated in the declaration, of necessary absorption. Knowledge could be set up in defense upon the question whether there was due care under the circumstances, but it could not make the case stated demurrable. That is quite different from Flynn v. International Co. and the case at bar, which cases allege defects, simply, and the demurrer is upon the point of negativing knowledge of the defect.

Until recent years, negligence cases in this state were rare; but, of those in our reports which state the pleadings, the custom has been to allege either want of knowledge of the defendant's negligence or an excuse. See Smith v. Tripp, 13 R. I. 152; Cox v. Providence Gas Co., 17 R. I. 199, 21 Atl. 344; Parker v. Providence Co., 17 R. I. 376, 22 Atl. 284, 23 Atl. 102, 14 L. R. A. 414, 33 Am. St. Rep. 869; Wilson v. N. Y., N. H. & H. R. Co., 18 R. I. 491, 29 Atl. 258; Disano v. New England Co., 20 R. I. 452, 40 Atl. 7; Jones v. New Am. Co., 21 R. I. 125, 42 Atl. 509; Pintorelli v. Horton, 22 R. I. 374, 48 Atl. 142; Baumler v. Narragansett, 23 R. I. 430, 50 Atl. 841; King v. Railroad Co., 23 R. I. 583, 51 Atl. 301, 70 L. R. A. 924; Baumler v. Narragansett, 23 R. I. 611, 51 Atl. 203; Milhench v. Jenckes, 24 R. I. 131, 52 Atl. 687; Cox v. American Co., 24 R. I. 503, 53 Atl. 871, 60 L. R. A. 629; Russell v. Riverside, 24 R. I. 591, 54 Atl. 375; Paoline v. Bishop, 25 R. I. 298, 55 Atl. 752.

As a general rule, therefore, the defendant should negative the assumption of a known risk. The cases cited will furnish illustrations of excuse for continuing work by necessary absorption, by lack of appreciation of danger, from youth, inexperience, emergency, etc., by promise to repair a defect, and by inability to know the exact cause of the injury, but stating enough to raise a presumption of negligence.

In the case at bar it is alleged that the plaintiff was putting a ring packer on the plunger of a pump, in the course of his duty; that the valve was unsafe and out of repair, permitting steam to escape, so that the plunger was liable to start up at any time; and that it did start while he was at work upon it, whereby his hand was injured. So far as appears from the declaration, this condition may have been known to the plaintiff, and the risk of working on it assumed by him. It does not state that it was not known, or state any excuse for so working on it if it was known. The natural inference from what is stated is that it was known, and so an assumed risk.

The demurrer to the declaration is sustained.[44]

[44] Hayden v. Mfg. Co., 29 Conn. 548, 561 (1861); Fortin v. Manville Co., 128 Fed. 642 (1904: Rhode Island law); Chicago Ry. v. Bell, 111 Ill. App. 280, 289 (1903) semble; Buzzell v. Mfg. Co., 48 Me. 113, 122, 77 Am. Dec. 212 (1861); Cristanelli v. Mining Co., 154 Mich. 423, 428, 117 N. W. 910 (1908) semble; Grover v. Railroad, 76 N. J. Law, 237, 69 Atl. 1082 (1908); N. & W. Ry. v. Jackson, 85 Va. 489, 497, 8 S. E. 370 (1888). Accord. So. Car Co. v. Jennings, 137 Ala. 247, 256, 34 South. 1002 (1902); Chicago R. R. v. Hines, 132 Ill. 161, 168, 23 N. E. 1021, 22 Am. St. Rep. 515 (1890); City v. Kostka,

DECLARATION IN CASE FOR LIBEL.

(2 Chitty, Pleading [13th Am. Ed.] pp. *596, *620.)

In the Common Pleas.

——— next after ——— in ——— Term, ——— Will. 4.

——— (to wit) C. D. was attached to answer A. B. of a plea of trespass on the case, and thereupon the said A. B. by E. F. his attorney, complains, for that whereas the said plaintiff, now is a good, true, honest, just, and faithful subject of this realm, and as such has always behaved and conducted himself, and until the committing of the several grievances by the said defendant as hereinafter mentioned, was always reputed, esteemed, and accepted by and amongst all his neighbors, and other good and worthy subjects of this realm to whom he was in any wise known, to be a person of good name, fame, and credit, to wit, at, &c. (venue).—And whereas also, the said plaintiff hath not ever been guilty, or until the time of the committing of the said several grievances by the said defendant as hereinafter mentioned, been suspected to have been guilty of perjury or any other such crime. —By means of which said premises, the said plaintiff, before the committing of the said several grievances by the said defendant as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbors, and other good and worthy subjects of this realm, to whom he was in any wise known, to wit, at, &c. (venue) aforesaid.—And whereas also, before the committing of the several grievances by the said defendant as hereinafter mentioned, a certain action had been depending in the said court of our lord the now king, before the king himself, at Westminster, in the county of Middlesex, wherein one G. H. was the plaintiff, and one J. K. was the defendant, and which said action had been then lately tried at the assizes in and

190 Ill. 130, 134, 60 N. E. 72 (1901) semble; Lee v. Mills Co., 21 R. I. 322, 43 Atl. 536 (1899). Contra.

It seems to be often assumed that negativing knowledge of the defect is negativing assumption of the risk. Walsh v. Railway, 34 Fla. 1, 11, 15 South. 686 (1894); Grover v. Railroad, 76 N. J. Law, 237, 69 Atl. 1082 (1908); Manzi v. Wire Co., 29 R. I. 460, 72 Atl. 394 (1909); N. & W. Ry. v. Jackson, 85 Va. 489, 497, 8 S. E. 370 (1888). But in Gould v. Railway, 141 Ill. App. 344 (1908), it was held that negativing knowledge of risk was insufficient as it did not appear but that he had easy means of knowing. In other cases negativing knowledge of the risk is assumed to be the same as negativing contributory negligence, and is required or not according to the rule of the jurisdiction on that question. Mobile R. R. v. George, 94 Ala. 199, 215, 10 South. 145 (1891); James v. Mining Co., 55 Mich. 335, 338, 21 N. W. 361 (1884); Richmond Co. v. Bailey, 92 Va. 554, 559, 24 S. E. 232 (1896); Hoffman v. Dickinson, 31 W. Va. 142, 146, 6 S. E. 53 (1888).

It has been held that an allegation that the plaintiff was without fault sufficiently alleges that he did not assume the risk. City v. Kostka, 190 Ill. 130, 60 N. E. 72 (1901); Cristanelli v. Mining Co., 154 Mich. 423, 428, 117 N. W. 910 (1908).

Obviously negativing contributory negligence does not show non-assumption of the risk. Brainard v. Van Dyke, 71 Vt. 359 (1899).

See, generally, 26 Cyc. 1397.

for the county of ———, and on such trial the said plaintiff had been and was examined on oath, and had given his evidence as a witness for and on the part and behalf of the said G. H. to wit, at, &c. (venue) aforesaid. Yet the said defendant, well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving, and wickedly and maliciously intending to injure the said plaintiff in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace with and amongst all his neighbors, and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbors and subjects, that he the said plaintiff had been and was guilty of perjury, and to subject him to the pains and penalties by the laws of this kingdom made and provided against, and inflicted upon persons guilty thereof, and to vex, harass, oppress, impoverish, and wholly ruin the said plaintiff heretofore, to wit, on, &c. at, &c. (venue) aforesaid, falsely, wickedly, and maliciously did compose and publish, and cause and procure to be published, of and concerning the said plaintiff, and of and concerning the said action which had been so depending as aforesaid, and of and concerning the evidence by him the said plaintiff given on the said trial, as such witness as aforesaid, a certain false, scandalous, malicious, and defamatory libel containing, amongst other things the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the said plaintiff, and of and concerning the said action, and of and concerning the evidence by him the said plaintiff given on the said trial, as such witness as aforesaid, that is to say he (meaning the said plaintiff) was foresworn on the trial (meaning the said trial), and thereby then and there meaning that the said plaintiff, in giving his evidence as such witness, on the said trial as aforesaid, had committed wilful and corrupt perjury. And the said plaintiff further saith, that the said defendant further contriving and intending as aforesaid, heretofore, to wit, on the day and year aforesaid, at, &c. (venue) aforesaid, falsely, wickedly, and maliciously, did publish a certain other false, scandalous, malicious, and defamatory libel, of and concerning the said plaintiff, and of and concerning the said action, which had been so depending as aforesaid, and of and concerning the evidence by him the said plaintiff given on the said trial, as such witness as aforesaid, containing, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the said plaintiff, and of and concerning the said action, and of and concerning the evidence given by him the said plaintiff on the said trial, as such witness as aforesaid, that is to say, (vary the statement of the words and inuendoes, as may be advisable, under the particular circumstances of each case.)—And the said plaintiff further saith, that the said defendant further contriving and intending as aforesaid, afterwards, to wit, on the day and year aforesaid, at, &c. (venue) aforesaid, falsely, wickedly, maliciously, wrongfully, and unjustly, did publish, and cause and procure to be published,

a certain other false, scandalous, malicious, and defamatory libel, of and concerning the said plaintiff, as follows, that is to say, he (meaning the said plaintiff) is perjured. By means of the committing of which said several grievances by the said defendant as aforesaid, the said plaintiff hath been and is greatly injured in his said good name, fame, and credit, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbors, and other good and worthy subjects of this realm, insomuch that divers of those neighbors and subjects, to whom the innocence and integrity of the said plaintiff in the premises were unknown, have, on account of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe the said plaintiff to have been, and to be a person guilty of perjury and have, by reason of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto wholly refused, and still do refuse to have any transaction, acquaintance, or discourse with the said plaintiff, as they were before used and accustomed to have, and otherwise would have had. And also by reason thereof one M. N., who before, and at the time of the committing of the said grievance, was about to retain and employ, and would otherwise have retained and employed the said plaintiff as his servant, for certain wages and reward, to be therefore paid to the said plaintiff afterwards, to wit, on the day and year aforesaid, at, &c. (venue) aforesaid, wholly refused to retain and employ the said plaintiff in the service and employ of the said M. N. and the said plaintiff hath from thence hitherto remained and continued, and still is wholly out of employ; and the said plaintiff hath been and is, by means of the premises, otherwise greatly injured, to wit, at, &c. (venue) aforesaid. Wherefore the said plaintiff saith that he is injured, and hath sustained damage to the amount of £———., and therefore he brings his suit, &c.

DECLARATION IN CASE FOR SLANDER.

(2 Chitty, Pleading [13th Am. Ed.] pp. *596, *641h.)

In the Common Pleas.

——— next after ——— in ——— Term, ——— Will. 4.

——— (to wit.) C. D. was attached to answer A. B. of a plea of trespass on the case, and thereupon the said A. B. by E. F. his attorney, complains, for that whereas the said plaintiff now is a good, true, honest, just, and faithful subject of this realm, and as such hath always behaved and conducted himself, and until the committing of the several grievances by the said defendant as hereinafter mentioned, was always reputed, and esteemed, and accepted, by and amongst all his neighbors, and other good and worthy subjects of this realm, to

whom he was in any wise known, to be a person of good name, fame, and credit, to wit, at, &c. (venue). And whereas also the said plaintiff hath not ever been guilty, or, until the time of the committing of the said several grievances by the said defendant as hereinafter mentioned, been suspected to have been guilty, of the offences and misconduct as hereinafter stated to have been charged upon and imputed to the said plaintiff by the said defendant. By means of which said premises the said plaintiff, before the committing of the said grievances by the said defendant as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbors, and other good and worthy subjects of this realm, to whom he was in any wise known, to wit, at, &c. (venue) aforesaid. Yet the said defendant, well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving and wickedly and maliciously intending to injure the said plaintiff, and to bring him into public scandal, infamy and disgrace, with and amongst all his neighbors and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbors and subjects, that the said plaintiff had been and was guilty of the offences and misconduct hereinafter stated to have been charged upon and imputed to him by the said defendant, and to vex, harass, oppress, impoverish, and wholly ruin the said plaintiff, heretofore, to wit, on, &c. (the day of speaking the words or about it) at, &c. (venue) aforesaid, in a certain discourse which he the said defendant then and there had with the said plaintiff, of and concerning him the said plaintiff, in the presence and hearing of divers good and worthy subjects of our lord the king, then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published, of and concerning the said plaintiff, the false, scandalous, malicious, and defamatory words following, that is to say, "he," (meaning the said plaintiff) "is a rogue." By means of the committing of which said several grievances by the said defendant as aforesaid, the said plaintiff hath been and is greatly injured in his said good name, fame, and credit, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbors, and other good and worthy subjects of this realm, insomuch that divers of those neighbors and subjects, to whom the innocence and integrity of the said plaintiff in the premises were unknown, have, on account of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe the said plaintiff to have been and to be a person guilty of the offences and misconduct so as aforesaid charged upon and imputed to him by the said defendant, and have, by reason of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto wholly refused, and still do refuse, to have any transaction, acquaintance, or discourse with the said plaintiff, as they were before used and accustomed to have and otherwise would have had. And also by means of the said premises the said plaintiff hath been

and is greatly injured in his credit and reputation, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbors, friends and acquaintance, insomuch as divers of those friends and neighbors, and especially G. H., J. K., M. N., &c. (the persons hereinbefore in that behalf named,) have wholly refused to permit any intercourse or society with him, or to receive and admit him into their respective houses or company, or to find or provide for him, meat, drink, or any other benefit and advantages in any manner whatsoever, as they before that time had done, and otherwise would have continued to have done, whereby the said plaintiff hath lost all those valuable benefits and advantages, being to him theretofore of great value, to wit, of the value of £———. and hath been and is greatly reduced and prejudiced in his fortunes and pecuniary circumstances, and obliged to incur a much greater expense in his necessary living and supporting himself, to a large amount, to wit, to the annual amount of £———. than he heretofore had done, and otherwise would have continued to do, and hath been and is greatly impoverished, and all his friends have wholly withdrawn their friendship and acquaintance, to wit, at, &c. (venue) aforesaid. Wherefore the said plaintiff saith that he is injured, and hath sustained damage to the amount of £———., and therefore he brings his suit, &c.

JONES v. STEVENS.

(Court of Exchequer, 1822. 11 Price, 235.)

To an action for libel the defendant pleaded the general issue and some bad special pleas. At the trial the defendant wished to introduce evidence of the general bad reputation of the plaintiff. The Court held it inadmissible on any ground.

Wood, Baron,[45] thus meets one of the arguments for its admissibility: * * * Mr. Abraham was still bolder, and asserted that such evidence might be given, not only on the general issue, but also under the special pleas, because the plaintiff had stated in his declaration the usual averment, that he was a person of good name, fame, and credit, and that he was therefore bound to prove it. This is new doctrine to me. I have ever understood, that general good character is always presumed in law; unless, by evidence of particular acts, fairly and specifically put in issue, that presumption is negatived. Some cases have been mentioned, wherein it should seem that such evidence has been received at Nisi Prius. I will not attempt to distinguish the present case from those. I strongly protest, however, against any such mischievous doctrine altogether: and deny that it has any legal foundation. It cannot be supported on any principle of law. I say, distinctly, that it is not warranted by the law of the land: and whatever cases

[45] Parts of this case are omitted.

may be cited to support such doctrine, I cannot assent to them. When I am told by the House of Lords (who, I presume, would take and act upon the opinion of the judges,) that such is the law, I will then (as I must) submit to consider it to be the law; but certainly not till then. * * *

Rule discharged.[46]

KENYON v. CAMERON.

(Supreme Court of Rhode Island, 1890. 17 R. I. 122, 20 Atl. 233.)

Exceptions from court of common pleas, Washington County.

DURFEE, C. J.[47] This is case for slander. The declaration contains several counts. The first count purports to set forth the very words used by the defendant in slandering the plaintiff. The other counts, except the last, allege the making of defamatory charges by the defendant against the plaintiff, without purporting to set forth the very words used, or even words that were substantially the same as the words used. The defendant pleaded the general issue, with notice of justification by proof of the truth of the alleged slanders. The case was tried in the court of common pleas, and resulted in a verdict for the plaintiff for one dollar. It comes before us on exceptions taken by the plaintiff.

The first exception is because, in the court below, immediately after the plaintiff had opened his case, the defendant's counsel gave notice that he should object to all evidence offered except on the first count, because the other counts did not set forth the words of the alleged slander; and the court sustained the objection. The plaintiff contends that this was error, and cites Whiting v. Smith, 13 Pick. (Mass.) 369, which fully supports him. That case follows Nye v. Otis, 8 Mass. 122, 5 Am. Dec. 79, and rests, like said case, largely on a dictum of Lord Hardwicke in Nelson v. Dixie, Cas. t. Hardw. 305, and on certain books of precedents or forms. Lord Hardwicke's dictum has been rejected in England and in this country. The doctrine of the Massachusetts cases has not met with approval. The leading case in England is Cook v. Cox, 3 Maul. & S. 110, (decided A. D. 1814.) "It is of the substance of a charge for slander, by words," said Lord Ellenborough in giving judgment in that case, "that the words themselves should be set out with sufficient innuendoes and a sufficient explanation, if required, to make them intelligible." Lord Ellenborough pointedly condemned the dictum of Lord Hardwicke, which was cited to the contrary. In Gutsole v. Mathers, 1 Mees. & W. 495, 502, (decided A. D. 1836,) Lord Abin-

[46] Strachy v. ———, Style, 118 (1649: plea denying plaintiff's good reputation demurred to and held bad); Coleman v. Southwick, 9 Johns. (N. Y.) 45, 48, 6 Am. Dec. 253 (1812) semble. Accord.

[47] Part of the opinion omitted.

ger said that the judgment in Cook v. Cox was delivered after much consideration, and in that case it was accepted as settling the law. "If it were sufficient to state merely the effect of the words," said Lord Abinger in Gutsole v. Mathers, "any person would be at liberty to swear as to the effect of the words without stating any precise words; and, even if the witness did state precise words, the jury would have to judge of their legal effect, whereas that is generally to be decided by the court." In Cook v. Cox, Lord Ellenborough gives another reason why it is important that the words should be set out. "Unless the very words are set out," he says, "by which the charge is conveyed, it is almost if not entirely impossible to plead a recovery in one action in bar of a subsequent action for the same cause. Identity may be predicated with certainty of words, but not of the effect of them as produced upon the mind of a hearer." Mr. Chitty, who doubtless states the law as it is understood to exist in England, says: "The libel itself, or slanderous words, must be set out in hæc verba, and the declaration must profess so to set forth the matter." 1 Chit. Pl. *404. The strictness of the rule is illustrated by this: that, if the slander be uttered in a foreign language, it must be set out in the original words;[48] the import thereof being averred in English.[49] Zenobio v. Axtell, 6 Term Rep. 162.

In this country the English rule has been followed, with some slight relaxation in some of the states. Forsyth v. Edmiston, 5 Duer (N. Y.) 653; Ward v. Clark, 2 Johns. (N. Y.) 10, 3 Am. Dec. 383; Fox v. Vanderbeck, 5 Cow. (N. Y.) 513; Taylor v. Moran, 4 Metc. (Ky.) 127; Bagley v. Johnston, 4 Rich. Law (S. C.) 22; Parsons v. Bellows, 6 N. H. 289, 25 Am. Dec. 461; Haselton v. Weare, 8 Vt. 480; Yundt v. Yundt, 12 Serg. & R. (Pa.) 427. In Kennedy v. Lowry, 1 Bin. (Pa.) 393, it was held that it was not necessary that the declaration should purport to set forth the identical words, but it would suffice if it professed to set forth the words substantially as used. In Tipton v. Kahle, 3 Watts (Pa.) 90, it was said, in explanation of Kennedy v. Lowry, that the purport of the words may be laid, "but it is not permitted to drop altogether both the language and ideas uttered, and sum up all in one round charge, and then leave it to the jury to say whether the words proved amounted to that charge."

[48] Zenobia v. Axtell, 6 D. & E. 162 (1795); Jenkins v. Phillips, 9 C. & P. 766 (1841); Romano v. De Vita, 191 Mass. 457, 78 N. E. 105 (1906) semble; Wormouth v. Cramer, 3 Wend. (N. Y.) 395, 20 Am. Dec. 706 (1829); Rahauser v. Barth, 3 Watts (Pa.) 28 (1834); Zeig v. Ort, 3 Pinney (Wis.) 30 (1850). Accord.

[49] It is generally said that a translation of the original must be given. Zenobia v. Axtell, 6 D. & E. 162 (1795) semble; Hickley v. Grosjean, 3 Blackf. (Ind.) 351 (1842) semble; Romano v. De Vita, 191 Mass. 457, 78 N. E. 105 (1906) semble; Wormouth v. Cramer, 3 Wend. (N. Y.) 395, 20 Am. Dec. 706 (1829); Zeig v. Ort, 3 Pinney (Wis.) 30 (1850). Accord. Anonymous, Hob. 126a (1646); 1 Williams' Saund. Rep. 242, note 1. Contra.

The English translation is admitted by a demurrer. Hickley v. Grosjean, 6 Blackf. (Ind.) 351 (1842).

We do not think that the court below, under the law as thus laid down, even in the cases in which it is laid down most broadly, committed any substantial error; for, though the last count may be allowable under the Pennsylvania cases, it but repeats a part of the slander of the first count in such form that proof thereof would likewise be proof under the first count. The first exception must, therefore, be overruled. * * *

Exceptions overruled.[50]

WHITING v. SMITH.

(Supreme Court of Massachusetts, 1832. 13 Pick. 364.)

In this case the court sustained a count which purported to state merely the substance of the slander. A part of the opinion by MORTON, J., follows:

* * * This mode of declaring, in our opinion, infringes no legal principle and violates no rule of pleading. It gives to the defendant reasonable notice of the complaint to which he is called to answer; and furnishes adequate defence against another action for the same cause. The court will always protect the parties against surprise; and for this purpose will ever require the plaintiff to furnish a particular statement of the grounds of his action, when the nature of the case renders it necessary. And this practice extends to actions of slander, as well as to other suits. When the judgment is pleaded in bar of another action for the same cause, there can be no greater difficulty in proving the identity, than in many other actions where it does not appear from the record.

[50] Newton v. Stubbs, 2 Shower, 435 (1685); Cook v. Cox, 3 M. & S. 110 (1814); Wright v. Clements, 3 B. & Al. 503 (1820); Gendron v. St. Pierre, 72 N. H. 400, 56 Atl. 915 (1903); Webster v. Holmes, 62 N. J. Law, 55, 40 Atl. 778 (1898); Blessing v. Davis, 24 Wend. (N. Y.) 100 (1840); Bagley v. Johnston, 4 Rich. Law (S. C.) 22 (1850); Zeig v. Ort, 3 Pinney (Wis.) 30 (1850). Accord. For cases contra, see the notes to the next case.

A substantial variance from the language stated, though the meaning remains the same, is fatal. Cartwright v. Wright, 5 B. & Al. 615 (1822); Wallace v. Dixon, 82 Ill. 202 (1876); Kuhlman v. Kiefer, 147 Ill. App. 162 (1909); Jones v. Edwards, 57 Miss. 28 (1879); Edgerley v. Swain, 32 N. H. 478 (1855); Fox v. Vanderbeck, 5 Cow. (N. Y.) 513 (1826); Roberts v. Lamb, 93 Tenn. 343, 27 S. W. 668 (1894).

But a slight variance from the words stated, if the sense is left untouched, will be disregarded. Orpwood v. Barkes, 4 Bing. 261 (1827); Lee v. Crump, 146 Ala. 655, 668, 40 South. 609 (1906); Thomas v. Fischer, 71 Ill. 576 (1874); Robinson v. Van Auken, 190 Mass. 161, 166, 76 N. E. 601 (1906: affected by statute); Wiest v. Luyendyk, 73 Mich. 661, 41 N. W. 839 (1889); Freisinger v. Moore, 65 N. J. Law, 286, 47 Atl. 432 (1900); Kidder v. Bacon, 74 Vt. 263, 277, 52 Atl. 322 (1900).

It is no objection that but part of the words are stated, provided that part is in itself actionable. Buckingham v. Murray, 2 Car. & P. 46 (1825); Rutherford v. Evans, 6 Bing. 451 (1830); Spencer v. McMasters, 16 Ill. 405 (1855); Edgerly v. Swain, 32 N. H. 478 (1855) semble.

If the defamation is not in language, it must be described as accurately as is reasonable. Ellis v. Kimball, 16 Pick. (Mass.) 132 (1834).

There is great convenience in this general mode of declaring. It prevents unreasonable prolixity. For the plaintiff may not know beforehand exactly what words he may be able to prove. Witnesses may not agree in their recollection of words, although they may entirely agree as to the substance. Hence with a certainty of the slanderous charge, the plaintiff may be under the necessity of declaring in a great many counts and introduce a great many different sets of words, all, substantially, of the same import, to meet his proof; and thus occasion great prolixity on the record, great inconvenience in the trial, and perhaps at last, with a just cause and plenary proof, be defeated by some verbal variance.

If the plaintiff sets forth the words, he is bound to prove them as laid. Things immaterial in themselves are often made material by a special allegation. And although the ancient strictness in this respect is exploded, yet it is now a settled and reasonable rule in pleading, that the allegata and probata must agree, and that the material and actionable words must be proved as stated, and cannot be supplied by proof of equivalent words.

To prevent a failure of justice and to preserve the administration of the law from reproach, courts have been tempted to allow variances in proof inconsistent with the rules of good pleading. And this has introduced many nice and unfounded distinctions, if not inconsistencies and absurdities in this branch of the law.

It cannot be necessary to state the words, to enable the court to determine whether they are actionable or not; for this can as well be done upon proof in court, as upon averment and demurrer, and will save the court the unnecessary labor of deciding a case which may never be proved, and perhaps never existed in fact.

Upon a careful revision of the subject, we are well satisfied with the law as laid down in Nye v. Otis.[51] We think that case was fully considered and wisely decided; and we are happy to say in relation to it, stare decisis. * * *

All the counts, in our opinion, are good, and the proof proper to support them; judgment must therefore be rendered on the verdict.[52]

[51] 8 Mass. 122, 5 Am. Dec. 79 (1811).

[52] Nelson v. Dixie, Cas. t. Hardwicke, 305 (1736) semble; Kimball v. Page, 96 Me. 487, 52 Atl. 1010 (1902); Kennedy v. Lowry, 1 Bin. (Pa.) 393 (1808); Lukehart v. Byerly, 53 Pa. 418 (1866) semble; Kyzer v. Grubbs, 2 McCord, 305 (1822).

In Massachusetts a statute changed the rule laid down in the principal case and required the words to be stated substantially. Lee v. Kane, 6 Gray, 495 (1856); Middleby v. Effler, 118 Fed. 261, 55 C. C. A. 355 (1902; Massachusetts law).

BRETTUN v. ANTHONY.

(Supreme Court of Massachusetts, 1869. 103 Mass. 37.)

Tort for slander. The third count of the declaration alleged that the plaintiff was the owner of a certain building in Raynham, and occupied it, for the purpose of his trade, with goods, wares, merchandise and other chattels, his property, and for a store; that said building, and also said goods, wares, merchandise, and other chattels therein were insured against loss or damage by fire, and were destroyed by fire during the time they were insured; that "after said destruction by fire, the defendant, speaking with reference thereto, well knowing that said building, and also said goods, wares, merchandise and other chattels therein were insured against loss or damage by fire as aforesaid, publicly, falsely and maliciously accused the plaintiff of the crime of wilfully burning said building, and the goods, wares, merchandise and other chattels therein, at the time they were so insured against loss or damage by fire, with the intent to injure the insurers thereof, by words spoken of the plaintiff, substantially as follows: 'Some of the folks up your way think that Henry' (meaning the plaintiff) 'burned the store.' 'I' (meaning the defendant) 'have no doubt but what he' (meaning the plaintiff) 'burned it.'"

The fourth count alleged that the plaintiff petitioned for the benefit of the bankrupt act, and was duly adjudged a bankrupt; that proceedings upon the plaintiff's petition were now pending; that the defendant was a creditor of the plaintiff, and had duly proved his claim in bankruptcy; that "the defendant, well knowing that said proceedings in bankruptcy had been commenced as aforesaid, publicly, falsely, and maliciously accused the plaintiff of a crime and misdemeanor; in this, that the plaintiff, with the intent to defraud his creditors, within three months before the commencement of the proceedings in bankruptcy on said petition of the plaintiff, did dispose of, otherwise than by bona fide transactions in the ordinary way of trade, his goods or chattels obtained on credit and remaining unpaid for; and in this, that the plaintiff did attempt to account for the property, or some part thereof, by fictitious losses or expenses; and in this, that the plaintiff did acts which are offences under, and are in violation of" the bankrupt act; "by words spoken of the plaintiff, during the time of the pendency of said proceedings in bankruptcy, substantially as follows: 'He' (meaning the plaintiff) 'is the biggest rascal off of the gallows. Some of the folks up your way think that Henry' (meaning the plaintiff) 'burned the store. I have no doubt but what he' (meaning the plaintiff) 'burned the store;' the defendant thereby referring to the destruction by fire referred to in the preceding count, by which fire certain memoranda, books, accounts and other papers relating to the plaintiff's trade or business were destroyed; and that the defendant did publicly, falsely and maliciously accuse the plaintiff, in words spok-

en of the plaintiff as above set forth, of acts, matters and things" whereby the plaintiff's discharge in bankruptcy would be withheld, or, if granted, would be invalidated.

The defendant demurred to these two counts as setting forth no good cause of action; and Wells, J., reserved the case on the demurrer for the consideration of the full court.

COLT, J. The sufficiency of two counts in the plaintiff's declaration is submitted upon this demurrer. The words actually used, as set forth in these counts, do not alone impute a crime which would render the plaintiff liable to punishment. They are consistent with a burning caused without criminal intent, by carelessness or accident; and additional facts are therefore alleged in each count, from which, it is claimed, the criminal quality of the act appears with certainty. This is to be settled by the familiar rules which govern the pleadings in actions of slander.[53]

Words in themselves harmless, or of doubtful import, become slanderous when used with reference to known existing facts and circumstances in such manner as to convey to the hearer a charge of crime. This limited protection to reputation the law attempts to give against indirect verbal imputation. It must however be made apparent, by suitable averments in the declaration, that the language employed was used by the defendant slanderously, to the extent stated; and the words, when taken in their plain and natural import, must be capable of the meaning attributed to them.

The facts which determine the alleged meaning are usually stated in a prefatory manner, followed by a positive averment, or colloquium, that the discourse was of and concerning these circumstances. What-

[53] It must appear in the declaration that the words are defamatory, and, if they were oral and special damage is not alleged, that they are actionable per se.

If the words on their face meet this requirement, no further allegation is necessary. Defamatory: Button v. Heyward, 8 Mod. 24 (1722); Croswell v. Weed, 25 Wend. (N. Y.) 621 (1841); Morissey v. Publishing Co., 19 R. I. 124, 32 Atl. 19 (1895). Actionable per se: Worth v. Butler, 7 Blackf. (Ind.) 251 (1844); Fowle v. Robbins, 12 Mass. 514 (1815); Bricker v. Potts, 12 Pa. 200 (1849).

If the words on their face do not meet this requirement then facts must be alleged which, if the words were spoken concerning these facts, will make the words have a meaning, defamatory or actionable per se. Defamatory: Todd v. Hastings, 2 Saunders, 307 (1671); Hillhouse v. Dunning, 6 Conn. 391, 407 (1827); McClean v. Fowle, 2 Cranch, C. C. (D. C.) 118, Fed. Cas. No. 8,691 (1816); Gerald v. Publishing Co., 90 Ill. App. 205 (1899); Tebbetts v. Goding, 9 Gray (Mass.) 254 (1857); Taylor v. Kneeland, 1 Doug. (Mich.) 67, 72 (1843); Edgerly v. Swain, 32 N. H. 478 (1855); Lukehart v. Byerly, 53 Pa. 418 (1866); McIntyre v. Weinert, 195 Pa. 52, 45 Atl. 666 (1900) semble; Payne v. Tancil, 98 Va. 262, 35 S. E. 725 (1900) semble. Actionable per se: Holt v. Scholefield, 6 D. & E. 691 (1796); Penry v. Dozier, 161 Ala. 292, 49 South. 909 (1909); Wing v. Wing, 66 Me. 62, 22 Am. Rep. 548 (1876); Dorsey v. Whipps, 8 Gill (Md.) 457 (1849); Young v. Cook, 144 Mass. 38, 10 N. E. 719 (1887); Dyer v. Morris, 4 Mo. 214 (1835); Walton v. Frost, 22 R. I. 157, 46 Atl. 680 (1900); Hoar v. Ward, 47 Vt. 657 (1875). Such allegations are often called inducement.

ever the particular order of their arrangement, these averments become material and traversable, and it must appear from them that the words impute the alleged offence. It is a further elementary principle, that the colloquium must extend to the whole of the prefatory inducement, necessary to render the words actionable.

An omission in the respect indicated will not be aided by mere innuendoes, whose office cannot add to or extend the sense or effect of the words set forth, or refer to anything not properly alleged in the declaration.[54] Snell v. Snow, 13 Metc. 278, 46 Am. Dec. 730. General allegations, that the defendant charged the plaintiff, falsely and maliciously, with the commission of a particular crime, accompanied by innuendoes, however broad and sweeping, will not aid a declaration otherwise imperfect. Thus, the act of burning one's own property becomes a crime only under special circumstances, as when done for the purpose of defrauding the insurers, or in violation of the provisions of the bankrupt act. Conversation about such burning, otherwise innocent, or of doubtful import, may be made actionable, if reference was had in it to these special circumstances, in such manner as necessarily to impute the crime. And the declaration is defective, if it does not set this forth by suitable averments.

It is no answer, that facts and circumstances enough are stated, unless it is also averred that the speech of the defendant was with reference to such facts, or so many of them as are essential elements in the crime. Nor is this want supplied by alleging that the defendant, at the time of speaking the words, had knowledge of the particular circumstances which make the act of which he speaks criminal. He is to be charged only for a wrong actually committed, irrespectively of his secret knowledge or intent. He is responsible only for the meaning which the words used by him, reasonably interpreted, convey to the understanding of the persons in whose presence they were uttered. Fowle v. Robbins, 12 Mass. 498; Bloss v. Tobey, 2 Pick. 320; Carter v. Andrews, 16 Pick. 1, 5; Sweetapple v. Jesse, 5 B. & Ad. 27.

Under the practice act, these rules of pleading still prevail. No averment need now be made which the law does not require to be proved; but all the substantial facts, necessary to constitute the cause

[54] Innuendoes will not serve the purposes of inducement and colloquium. Barham v. Nethersol, 4 Coke, 20 (1602); Day v. Robinson, 1 A. & E. 554 (1834); Wofford v. Meeks, 129 Ala. 349, 30 South. 625, 55 L. R. A. 214, 87 Am. St. Rep. 66 (1900); McLaughlin v. Fisher, 136 Ill. 111, 116, 24 N. E. 60 (1890); Hays v. Mitchell, 7 Blackf. (Ind.) 117 (1844); Hanna v. Singer, 97 Me. 128, 53 Atl. 991 (1902); Kilgour v. Co., 96 Md. 16, 30, 53 Atl. 716 (1902); Bloss v. Tobey, 2 Pick. (Mass.) 320 (1824); York v. Johnson, 116 Mass. 482 (1875); Watson v. Journal, 143 Mich. 430, 107 N. W. 81, 5 L. R. A. (N. S.) 480 (1906); Dyer v. Morris, 4 Mo. 214 (1835); Joralemon v. Pomeroy, 22 N. J. Law, 271 (1849); Miller v. Maxwell, 16 Wend. (N. Y.) 9 (1836); Naulty v. Bulletin Co., 206 Pa. 128, 55 Atl. 862 (1903); Hackett v. Publishing Co., 18 R. I. 589, 29 Atl. 143 (1894); Gordon v. Publishing Co., 81 Vt. 237, 244, 69 Atl. 742 (1908); Argabright v. Jones, 46 W. Va. 144, 32 S. E. 995 (1899).

of action, must be stated with substantial certainty. Tebbetts v. Goding, 9 Gray, 254; Chenery v. Goodrich, 98 Mass. 224.

The plaintiff's declaration, on the counts under consideration, does not in our opinion meet the requirements here stated. The first count avers, in substance, the destruction of the plaintiff's building with the goods therein,, and the fact that the building and goods were at the time of the loss insured against damage by fire. It then charges that the defendant, speaking with reference to said destruction by fire, and knowing of the insurance, accused the plaintiff of the crime of burning with intent to injure the insurer, by the words recited. The difficulty is, that the words thus spoken are, by reasonable construction, connected with only one of the prefatory allegations, namely, the burning of the building, and [not?] with the circumstances of the insurance. They do not therefore impute a crime. In other words, the colloquium is not coextensive with the whole inducement which the pleader thought necessary to set out.

The other count is open to the same objection, and fails to connect the words with any conversation relating to the plaintiff's bankruptcy, or any acts which are made offences under the bankrupt act.

Demurrer sustained.[55]

PEAKE v. OLDHAM.

(Court of Kings Bench, 1775. 1 Cowp. 275.)

Error from the Common Pleas in an action of slander, in which the plaintiff, now the defendant in error, declared that upon a colloquium of and concerning the death of one Daniel Dolly, the said Thomas Peake said to the said James Oldham, "you are a bad man, and I am thoroughly convinced that you are guilty, (meaning guilty of the murder of the said Dolly) and rather than you should want a hangman, I would be your executioner." And being apprized that the said words were actionable, and interrogated how he would prove, what he said, answered, that "he would prove it by Mrs. Harvey." 2. You are a bad man, and I am thoroughly convinced that you are guilty (innuendo ut antea) and rather than you should want a hangman I would be your executioner. Being interrogated how he could prove the said James Oldham guilty of the murder of the said D. Dolly, he replied, "I can prove it by Mrs. Harvey." 3. "You are guilty," (innuendo ut antea) "and I will prove it." 4. "I am thoroughly convinced that you are guilty," (meaning guilty of the death of Daniel Dolly), and rather

[55] Savage v. Robery, 2 Salk. 694 (1698); Hawkes v. Hawkey, 8 East, 427 (1807); Linville v. Earlywine, 4 Blackf. (Ind.) 469 (1838) semble; Wing v. Wing, 66 Me. 62, 22 Am. Rep. 548 (1876); Burtch v. Nickerson, 17 Johns. 217, 8 Am. Dec. 390 (1819) semble; Ryan v. Madden, 12 Vt. 51 (1840).

The rule is the same where the inducement is used to show that the words are defamatory. Harkness v. Daily News Co., 102 Ill. App. 162 (1902); Patterson v. Wilkinson, 55 Me. 42, 92 Am. Dec. 568 (1867).

than you should go without a "hangman I will hang you." 5. "You are guilty," innuendo (guilty of the murder of the said Dolly). By reason whereof, and to clear his character, the said James Oldham was obliged to procure, and did procure, an inquest in due form of law to be taken on the body of the said Daniel Dolly.

Upon not guilty pleaded, the jury found a general verdict upon all the counts, with £500. damages.

The defendant first moved for a new trial in C. B. which was refused; and afterwards in arrest of judgment, which rule was likewise discharged by GOULD and BLACKSTONE, Justices. (Absentib. DE GREY, Chief Justice, and NARES, Justice.)

Mr. Davenport, for the plaintiff in error, objected to the fourth and fifth counts of the declaration, as containing no sufficient ground of action. 1st, Because the words there laid are not scandalous in themselves. 2ndly, Not relatively so, by reference to any prefatory matter before stated: and consequently not capable of being made so by innuendo.

1st, The words, "you are guilty," have no determinate meaning at all, without specifying some act or charge to which they are referable, and, therefore, most clearly not actionable in themselves. 2nd. The colloquium laid is only a colloquium of the death of D. Dolly, not of an untimely or violent death, or that he died by the hands of the defendant, and, therefore, cannot by an innuendo be extended to a charge of murder. * * *

Mr. Buller, for the defendant, was stopped by Lord MANSFIELD, as being unnecessary to give himself any trouble.

Lord MANSFIELD.[56] * * * Let us consider then, the grounds upon which the declaration in the present case is attempted to be impeached. Two of the counts are objected to, viz. the 4th and last. In the 4th it is said thus, "I am thoroughly convinced that you are guilty;" innuendo, that you are guilty of the death of the said Daniel Dolly, "and rather than you should go without a hangman, I will hang you." Upon this count it is argued, that there are many innocent ways, by which one man may occasion the death of another; therefore, the words "guilty of the death," do not necessarily in themselves import a charge of murder; and consequently, as no particular act is charged which in itself amounts to an imputation of a crime, the words are defectively laid. What? when the defendant tells the plaintiff "he is guilty of the death of a person," is not that a charge and imputation of a very foul and heinous kind? Saying that such a one is the cause of another's death, as in the case of Miller v. Buckden, 2 Bulstr. 10, 11, is very different; because a physician may be the cause of a man's death, and very innocently so; but the word "guilty," implies a malicious intent, and can be applied only to something which is universally allowed to be a crime. But the defendant does not rest here: on

[56] Part of the case omitted.

the contrary, in order to explain his meaning he goes on and says, "and rather than you should be without a hangman, I will hang you." These words plainly shew what species of death the defendant meant, and, therefore, in themselves manifestly import a charge of murder.

The innuendo to the words of the next count is, that they mean "guilty of the murder of Daniel Dolly," and the jury by their verdict have found the fact; namely, that such was the meaning of the defendant. But that is not all; for the jury find a special damage sustained by the plaintiff in being obliged, in consequence of the charge so made by the defendant, to have an inquest taken on the body of the deceased.

What? After a verdict, shall the court be guessing and inventing a mode, in which it might be barely possible for these words to have been spoken by the defendant, without meaning to charge the plaintiff with being guilty of murder? Certainly not. Where it is clear that words are defectively laid, a verdict will not cure them. But where, from their general import, they appear to have been spoken with a view to defame a party, the court ought not to be industrious in putting a construction upon them, different from what they bear in the common ac ceptation and meaning of them. * * *

AFTON, WILLES, and ASHHURST, Justices, of the same opinion.

Judgment affirmed.[57]

[57] Vickers v. Stoneman, 73 Mich. 419, 41 N. W. 495 (1889) semble; Richard son v. Thorpe, 73 N. H. 532, 63 Atl. 580 (1906); Joralemon v. Pomeroy, 22 N. J. Law, 271 (1849); Cooper v. Greeley, 1 Denio, 347, 361 (1845); Stoner v. Erisman, 206 Pa. 600, 56 Atl. 77 (1903). Accord. Sheely v. Biggs, 2 Har. & J. (Md.) 363, 3 Am. Dec. 552 (1808). Contra.

Where the words have a plain meaning on which one is relying, an innuendo is unnecessary. Donahoe v. Publishing Co., 4 Pennewill (Del.) 166, 55 Atl. 337 (1902); Harris v. Burley, 8 N. H. 256 (1836) semble; Curley v. Feeney, 62 N. J. Law, 70, 40 Atl. 678 (1898) semble; 1 Williams' Saund. 242a, note.

If the words require no innuendo, an innuendo alleged may be disregarded and the plain meaning relied upon, if the innuendo is unjustified by the entire declaration: Harvey v. French, 1 Cr. & M. 11 (1832); Mix v. Woodward, 12 Conn. 262, 285 (1837); Elam v. Badger, 23 Ill. 498 (1860); Haynes v. Co., 169 Mass. 512, 48 N. E. 275 (1897); Sanford v. Rowley, 93 Mich. 119, 52 N. W. 1119 (1892); Hudson v. Garner, 22 Mo. 424 (1856); Curley v. Feeney, 62 N. J. Law, 70, 40 Atl. 678 (1898); Brown v. Telegram, 25 R. I. 117, 54 Atl. 1061 (1903); Jones v. Roberts, 73 Vt. 201, 50 Atl. 1071 (1901); Payne v. Tancil, 98 Va. 262, 35 S. E. 725 (1900). If the innuendo is justified, though unnecessary, the English courts refused to permit a departure from it Smith v. Carey, 3 Camp. 461 (1813); Williams v. Stott, 1 Cr. & M. 675, 87 (1833); Jackson v. Adams, 2 Bing. N. C. 402 (1835). In Richardson v. Thorpe, 73 N. H. 532, 63 Atl. 580 (1906), the court allowed such a departure. In Jones v. Roberts, 73 Vt. 201, 50 Atl. 1071 (1901), the English view was taken obiter.

ROELLA v. FOLLOW.

(Supreme Court of Indiana, 1845. 7 Blackf. 377.)

Error to the Allen Circuit Court.

BLACKFORD, J. This was an action of slander brought by the plaintiff in error. The declaration contains six counts.

The first count states that before the committing of the grievances, &c., a certain complaint had been pending before a certain justice of the peace, wherein the State of Indiana was plaintiff, &c.; and that, on the trial, the plaintiff was sworn and gave evidence as a witness on behalf of the State; yet the defendant well knowing the premises, in a certain discourse, &c., of and concerning the plaintiff, &c., falsely and maliciously spoke of and concerning the plaintiff, and of and concerning his said evidence at said trial, the false, scandalous, malicious, and defamatory words following, that is to say, "He" (meaning the plaintiff) "took a false oath."

The second, third, and fifth counts are similar to the first.

The fourth count alleges that in a certain other discourse, which the defendant then and there had of and concerning the plaintiff, &c., he, the defendant, then and there spoke and published of and concerning the plaintiff, &c., the false, scandalous, malicious, and defamatory words following, that is to say, "You" (meaning the plaintiff) "are a thief." The words laid in the sixth count are, "He" (the plaintiff meaning) "is a thief." The declaration concludes by alleging general damage in the usual form.

There was a general demurrer to each of the counts; and the demurrers were sustained. Judgment for the defendant.

The first, second, third, and fifth counts are insufficient. The words here complained of are not in themselves actionable. They amount only to a charge that the plaintiff was foresworn, which is not in itself actionable. Holt v. Scholefield, 6 T. R. 691. These counts, it is true, contain the requisite inducement and colloquium, but they omit the innuendo which is necessary, in such cases, to explain the defendant's meaning by reference to the previous matter. There is no objection to the other counts. The words there laid do, of themselves, import a crime; and there was consequently no occasion for an innuendo explaining their meaning.

PER CURIAM. The judgment is reversed with costs. Cause remanded, &c.[58]

[58] Curley v. Feeney, 62 N. J. Law, 70, 73, 40 Atl. 678 (1898) semble; Gosling v. Morgan, 32 Pa. 273 (1858) semble; Wood v. Scott, 13 Vt. 42, 47 (1841) semble; Sanderson v. Hubbard, 14 Vt. 462 (1842) semble. Accord.

WAISTEL v. HOLMAN.

(Superior Court of New York, 1829. 2 Hall, 193.)

Demurrer to the first and second counts of the plaintiff's declaration. The action was for a libel contained in a letter written, addressed and sent by the plaintiff to the defendant; and the question was as to the sufficiency of the publication set forth in the declaration.

The first count averred that the defendant, on the 28th day of September, in the year 1828, at the city and county of New York, "did compose, write, and deliver, and cause to be composed, written, and delivered to the plaintiff a certain false, scandalous, malicious, defamatory, and libellous matter following," &c., setting out the letter in hæc verba.

The second count alleged, that the defendant "published and caused and procured to be published, a certain other false, scandalous, malicious, and defamatory libel, addressed to the plaintiff, and of and concerning the plaintiff, containing certain other false, scandalous, malicious, defamatory, and libellous matter, of and concerning the plaintiff, as follows," &c., setting out the letter as in the first count.

To these two counts the defendant demurred; but took issue upon the other counts in the declaration, which were for slander.

OAKLEY, J. In Lyle v. Clason, 1 Caines, 581, the supreme court decided, that in every action for a libel, a publication of the libellous matter must be averred, that the sending of a sealed letter by the defendant to the plaintiff is not a publication of the libel, and that any letter sent is to be presumed to have been sealed. The principle of that case is, that when the declaration shows a publication of the libel to the plaintiff only, the action cannot be sustained. The court say, that the "basis of the action is damages for the injury to the character in the opinion of others," and that can only arise from publication to third persons. In the present case, the declaration alleges that the defendant composed, wrote and delivered to the plaintiff a certain libel, &c., addressed and directed to the plaintiff, &c. This averment does not show a publication of the libel. The plaintiff could not have sustained any injury by it, unless he communicated its contents to others, and of course had no right to sustain this action for damages. The first count falls clearly within the case of Lyle v. Clason, and the demurrer to it is well taken.[59]

The second count sets forth, that the defendant "did publish and cause and procure to be published, a certain other libel, addressed to the plaintiff." Here is a sufficient publication averred. Although it may be inferred that the libel was in the form of a letter addressed by the defendant to the plaintiff, yet the publication may have been, by

[59] Anonymous, Style, 70 (1648); Kysor v. Grubbs, 2 McCord (S. C.) 305 (1822); O'Donnell v. Nee (C. C.) 86 Fed. 96 (1898: Massachusetts law). Accord.

showing it to other persons, or even by inserting it in a newspaper. The particular mode of publication need not be set forth. The demurrer to the second count must, therefore, be overruled.[60]

Judgment for the defendant on the demurrer to the first count, and for the plaintiff on the demurrer to the second count, with liberty to either party to amend.

DUVIVIER v. FRENCH et al.

(Circuit Court of Appeals, Seventh Circuit, 1900. 104 Fed. 278, 43 C. C. A. 529.)

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The action in the court below was in case for damages growing out of the publication of an alleged libel. The declaration is as follows:

"A. Devin Duvivier, plaintiff in this suit, by his attorney, Kenesaw M. Landis, complains of Florence French and [the] Musical Courier Company, a corporation, etc., defendants, of a plea of trespass on the case.

"For that the said plaintiff is a subject of Her Brittanic Majesty, the Queen of England, and the said defendant, Florence French, is a citizen and resident of the State of Illinois, and the said Musical Courier Company is a corporation organized and existing under and by virtue of the laws of the State of New York, and is a citizen and resident of said last named state.

"And for that whereas, the plaintiff, from, to-wit: the year A. D. 1872, until the year A. D. 1891, was continuously engaged in the city of London, England, in the practice of his profession as a teacher of the art of singing, and the plaintiff did, during said period and until the plaintiff removed from said city of London, have as pupils,

[60] Penry v. Dozier, 161 Ala. 292, 49 South. 909 (1909) semble; McLaughlin v. Schnellbacher, 65 Ill. App. 50 (1895); Sproul v. Pillsbury, 72 Me. 20 (1880) semble; Watts v. Greenlee, 13 N. C. 115 (1829); Wilcox v. Moon, 63 Vt. 481, 22 Atl. 80 (1891); Sun Co. v. Bailey, 101 Va. 443, 44 S. E. 692 (1903). Accord.

Any other words signifying publication are sufficient to allege that the utterance was heard or read by third parties. Taylor v. How, Cro. Eliz. 861 (1601: "palam," "publice"); Baldwin v. Elphinstone, 2 W. Bl. *1037 (1775: printed); Brown v. Brashier, 2 Pen. & W. (Pa.) 114 (1830: "in presence of" third persons). Accord. Sproul v. Pillsbury, 72 Me. 20 (1880: printed). Contra. See further 13 Pl. & Pr. 43.

The publication need not be alleged to have been made to "good and worthy citizens." Burbank v. Horn, 39 Me. 233 (1855). The names of the persons to whom publication was made need not be given. Ware v. Cartledge, 24 Ala. 622, 60 Am. Dec. 489 (1854). If stated, publication to others may be proved without a variance. Penry v. Dozier, 161 Ala. 292, 49 South. 909 (1909); Goodrich v. Warner, 21 Conn. 432 (1852); Bradshaw v. Perdue, 12 Ga. 510 (1853); Richardson v. Hopkins, 7 Blackf. (Ind.) 116 (1844). Accord. Chapin v. White, 102 Mass. 139 (1869: but compare Downs v. Hawley, 112 Mass. 237 [1873]). Contra.

studying the art of singing, under the direction of the plaintiff, a large number of women and girls.

"And for that whereas, the plaintiff, from, to-wit: the month of October, A. D. 1891, to the present time, has been continuously, and now is engaged in the practice of his profession, as a teacher in the art of singing, in the city of Chicago, in the State of Illinois, and the plaintiff, during the said period last aforesaid, has had, and now has, as pupils studying the art of singing, under the direction of the plaintiff, a large number of women and girls.

"And for that whereas the plaintiff, before, and at the time of, the committing by the defendants, of the several grievances hereinafter mentioned, was a person of good name, credit and reputation, and deservedly enjoyed the esteem and good opinion of persons seeking instruction in the art of singing and of his neighbors and other worthy citizens of this state; yet the defendants, well knowing the premises, but wickedly and maliciously intending to injure the plaintiff and to bring him into public scandal and disgrace, on to-wit: the eighth day of September, A. D. 1897, at, to-wit: the District and Division aforesaid, wickedly and maliciously did compose and publish and cause to be composed and published of and concerning the plaintiff in a certain newspaper, called the Musical Courier, whereof the defendant, Florence French, was then and there the reporter and correspondent, and whereof the defendant, Musical Courier Company, was then and there the publisher and proprietor, a certain false scandalous, malicious, defamatory and libelous article containing (among other things) the false, scandalous, malicious, defamatory and libelous matter following, of and concerning the plaintiff, that is to say:

" 'Curiosity led me (meaning the defendant, the said Florence French,) to peruse the pamphlet entitled 'Some Remarks on the Voice' (meaning a lecture delivered by the plaintiff and published by the plaintiff in pamphlet form). It is merely a reproduction of the salient points of a lecture given at the Illinois Music Teachers' Convention. The remarks are such as [are] found in any ordinary publication treating of singing and appear to be copied verbatim. The only raison d'etre for this pamphlet is evidently the opportunity it offers for a vile gratuitous insult and wholesale abuse of a very estimable, conscientious, talented teacher, who is no disciple of quackism—Mr. Karleton Hackett (meaning and intending thereby to imply and charge that the plaintiff was, and is, a disciple of quackism.)

" 'This well-known teacher happens to enjoy the respect and esteem of those who understand honesty and scrupulousness (meaning and intending thereby to charge and imply that the plaintiff does not understand honesty and scrupulousness); moreover he, (meaning Mr. Karleton Hackett) is a gentleman, a state of being which it is possible the author (meaning the plaintiff) of the voice remarks cannot appreciate (meaning and intending thereby to charge that the

plaintiff was not, and is not, capable of conducting himself in a polite and gentlemanly manner and that the plaintiff did not, and does not, conduct himself in a polite and gentlemanly manner and that the plaintiff was not, and is not, capable of conducting himself with propriety and that the plaintiff did not, and does not, conduct himself with propriety). I (meaning the said Florence French) notice that in the preface of this pamphlet (meaning the pamphlet so published by the plaintiff as aforesaid) that this erstwhile teacher (meaning the plaintiff) at a famous London School (meaning the Royal Academy of Music) says he (meaning the plaintiff) has 'found it very necessary to modify one's European notions as to the relations existing between masters—no, teachers and pupils. This remark (meaning "he has found it very necessary to modify one's European notions as to the relations existing between masters—no, teachers and pupils") may be indorsed with the remark that this discovery is very beneficial for the pupils. Possibly had the discovery been made earlier Chicago would now possess one singing teacher the less and London one singing teacher the more,' (meaning and intending thereby to charge that the plaintiff's conduct towards his pupils during the plaintiff's professional labors, as teacher of the art of singing in the city of London, England, as aforesaid, was improper and immoral, and meaning and intending thereby to charge that the plaintiff's relations to his pupils during the plaintiff's professional labors as teacher of the art of singing in the said city of London as aforesaid, were improper and immoral, and meaning and intending thereby to charge that the plaintiff's conduct towards his said pupils and that the plaintiff's relations to and with his said pupils during the plaintiff's professional labors, as teacher of the art of singing in the city of London as aforesaid, were so improper and immoral, that it became, and was necessary for the plaintiff, by reason of said alleged improper and immoral conduct and relations as aforesaid, to abandon his professional labors as such teacher aforesaid in the city of London aforesaid, and to leave and go away from said city of London).

"By means whereof and the committing of which said several grievances by the defendants the plaintiff has been, and is, greatly injured in his good name and reputation and brought into public scandal and disgrace and has been, and is otherwise injured, to the damage of the plaintiff of ten thousand ($10,000) dollars.

"Therefore he brings his suit," etc.

To this declaration the defendants in error filed a general demurrer, which demurrer was, by the circuit court, sustained; and upon this action of the circuit court, sustaining the demurrer, the error relied upon to reverse the case is predicated.

Before Woods and Grosscup, Circuit Judges, and Bunn, District Judge.

After the foregoing statement of the case, Grosscup, Circuit Judge, delivered the opinion of the court, as follows:

The gravamen of an action for libel is not injury to the plaintiff's feelings, but damage to his reputation in the eyes of others. It is not sufficient, therefore, that the plaintiff should understand himself to be referred to in the article. It is necessary, to constitute libel, that others than the plaintiff should be in a position to understand that the plaintiff is the person referred to.

The article upon which the action in the court below was based, stripped of innuendos, and of averments in the way of inducement, is as follows:

"Curiosity led me to peruse the pamphlet entitled 'Some Remarks on the Voice.' It is merely a reproduction of the salient points of a lecture given at the Illinois Music Teachers' Convention. The remarks are such as [are] found in any ordinary publication treating of singing, and appear to be copied verbatim. The only raison d'etre for this pamphlet is evidently the opportunity it offers for a vile, gratuitous insult, and wholesale abuse of a very estimable, conscientious, talented teacher, who is no disciple of quackism, Mr. Karleton Hackett.

"This well-known teacher happens to enjoy the respect and esteem of those who understand honesty and scrupulousness; moreover, he is a gentleman, a state of being which it is possible the author of the 'Voice Remarks' cannot appreciate. I notice that in the preface to this pamphlet this erstwhile teacher at a famous London school, says he has 'found it very necessary to modify one's European notions as to the relations existing between masters—no, teachers and pupils.' This remark may be indorsed with the remark that the discovery is very beneficial for the pupils. Possibly had the discovery been made earlier, Chicago would possess one singing teacher the less and London one singing teacher the more."

The article in these words, and in these words alone, went to the readers of the Musical Courier. It contains in itself no guide to the identity of the person spoken of, except that, whoever he was, he was the author of the pamphlet named; and the inference derivable from the statement that the pamphlet is a reproduction of a lecture given at the Illinois Music Teachers' Association; and that its author was formerly a teacher in a famous London school, and is now a teacher of singing in Chicago.

It is averred in the inducement that the plaintiff was formerly a teacher in a London school, and is now a teacher of singing in Chicago; but this alone is not sufficient to identify the plaintiff with the person spoken of, for in a city of the size of Chicago there may be many singing masters who formerly were teachers in London schools.

No facts are averred disclosing that any reader of the Courier had ever heard of the pamphlet, or of the lecture, or that any one, not even its publishers, knew that the plaintiff was the author of the pamphlet. Indeed, it is not averred that the plaintiff was the author of the pamphlet. The article, therefore, furnishes no knowledge that may

be said, either directly or by reasonable inference, to lead up to the identification of the plaintiff with the person spoken of in the article; and the declaration contains no averment of knowledge, extrinsic to the article, that may, with reasonable certainty, connect the article with the plaintiff. For all that appears on the face of the declaration, the readers of the article in the Courier may each and all, have reasonably supposed that the article referred to some one other than the plaintiff.

It is true that the declaration avers that the defamatory language was used of and concerning the plaintiff, but, as has already been said, it is not enough, to constitute libel, that the plainiff knew that he was the subject of the article, or that the defendants knew of whom they were writing; it must appear upon the face of the declaration that persons other than these must have reasonably understood that the article was written of and concerning the plaintiff, and that the so-called libelous expressions related to him.

It is true, also, that in an innuendo it is stated inferentially that the pamphlet was originally a lecture delivered by the plaintiff, and by him published in pamphlet form; but an averment of fact extrinsic to the article, and essential to an identification of the article with the person complaining, cannot be embodied in an innuendo. 13 Enc. Pl. & Prac. 54.

The office of an innuendo is to deduce inferences from premises already stated, not to state the premises themselves. An innuendo is not an issuable averment. Facts extrinsic to the article, and essential to a reasonable identification of the plaintiff with the person referred to, must be set out in the inducement. Id. 52; McLaughlin v. Fisher, 136 Ill. 111–116, 24 N. E. 60.

Let this whole article be read without knowledge that the plaintiff was the author of the pamphlet, or without knowledge of the facts reasonably connecting the plaintiff with the authorship of the pamphlet, and no one would know that the plaintiff was the person referred to in the article. This want of information, in the absence of the essential introductory averment, must be assumed to have been the state of mind of the readers of the article.

For these reasons, we see no error in the ruling of the Circuit Court sustaining the demurrer, and it is, therefore, affirmed.[61]

[61] Goldsborough v. Orem, 103 Md. 671, 682, 64 Atl. 36 (1906) semble; Miller v. Maxwell, 16 Wend. (N. Y.) 9 (1836). Accord.

If the language is foreign, it must be alleged that the persons to whom published understood the foreign language. Price v. Jenkings, Cro. Eliz. 865 (1601); Rich v. Scalio, 115 Ill. App. 166 (1904) semble; Wormouth v. Cramer, 3 Wend. (N. Y.) 394 (1829) semble; Zeig v. Ort, 3 Pin. (Wis.) 30 (1850). Accord. Newton v. Stubbs, 2 Shower, *435 (1685). Contra. But if the foreign words are spoken in a community inhabited by that nationality, then an allegation that the hearers understood the language is unnecessary. Bechtell v. Shatler, Wright (Ohio) 107 (1832). Accord. Price v. Jenkings, Cro. Eliz. 865 (1601). Contra.

MILLIGAN v. THORN.

(Supreme Court of New York, 1831. 6 Wend. 412.)

Demurrer to declaration. The action is slander. The declaration, after stating by way of inducement that the plaintiff is a son of James Milligan, of, &c., who has several other sons, brothers of the plaintiff, charges the defendant, in a single count, with saying, in a discourse he had with the plaintiff's father, in the presence and hearing of divers good and worthy citizens: "You have brought up your sons to break open letters and take out money; they (meaning the plaintiff and the other sons of J. Milligan) have done it, and I know who paid for it. You have allowed your sons to break open letters, and take money out of them; they have broken open letters, and taken money out of them. You have brought up your sons to break open letters and steal money out of them; they have broken open letters and stolen money out of them." The defendant demurs, and assigns for cause specially, that the declaration is double, the count containing two or more sets of pretended actionable words or causes of action, and that it is informal, &c.

By the court, SAVAGE, C. J. Different sets of words importing the same charge, laid as spoken at the same time, may be included in the same count, and the count for that cause is not bad Rathbun v. Emigh, 6 Wend. 407.

It is however insisted that the declaration is bad for want of a colloquium. In Hawkes v. Hawkey, 8 East, 431, Lord Ellenborough says the rule laid down in the book is this: "Where the words spoken do not in themselves naturally convey the meaning imputed by the innuendo, but also where they are ambiguous and equivocal, and require explanation by reference to some extrinsic matter to make them actionable, it must not only be predicated that such matter existed, but also that the words were spoken of and concerning that matter." This rule is found in Cowp. 682, and Salk. 694. In Van Vechten v. Hopkins, 5 Johns. 220, 4 Am. Dec. 339, Van Ness, Justice, explains the meaning of an averment, of a colloquium, and of an innuendo. An averment is to ascertain that to the court which is doubtfully expressed, and to add matter to make doubtful things clear; a colloquium shows that the words were spoken in reference to the matter of the averment; and an innuendo is explanatory of the subject matter sufficiently expressed before. Where the words are not at all doubtful, and convey a direct charge of an offence, or are otherwise actionable in themselves, no colloquium is necessary; but where extrinsic matter must be brought in to make the words actionable, a foundation must be laid in the recitals, by way of colloquium or averment. I will take this case by way of example. The plaintiff complains that he has been slandered. He is not named in the slanderous words. An innuendo cannot refer to anything not

previously expressed. The plaintiffs must therefore state a colloquium: That a conversation was had of and concerning him, or of and concerning the sons of J. Milligan. Without this, there is nothing expressed to which the innuendo can refer, when the plaintiff says that he was intended. In Stafford v. Green, 1 Johns. 505, the charge was false swearing in a justice's court. There was no colloquium about a trial in that court, but there was an innuendo. The court held that the want of a colloquium was not aided by the innuendo, as that can only explain, but not enlarge the meaning of words. So in Thomas v. Croswell, 7 Johns. 271, 5 Am. Dec. 269, Spencer, Justice, says: "An innuendo cannot extend to enlarge the meaning of previous words, and the matter to which it alludes from the antecedent parts of the declaration."

In Lindsey v. Smith, 7 Johns. 359, the count stated that in a certain discourse which the defendant had concerning the plaintiff as a justice, he uttered the slanderous words. It was objected after verdict, that the colloquium was not of and concerning a certain cause which was referred to in the slanderous words; but the court held the colloquium was sufficient to give point and application to the slander. And in Gidney v. Blake, 11 Johns. 54, the declaration stated that in a certain discourse which the defendant had with Gidney, of and concerning his children, the defendant charged his children to be thieves. The court held this to be sufficient; that the colloquium points the words, and designates the plaintiff as one of the children intended. In the case now before us there is no such colloquium, about the plaintiff, or about the children of James Milligan. It is that the defendant, in a certain discourse which he had with the father of the plaintiff, in the presence and hearing of divers good and worthy citizens, uttered the slanderous words, "You have brought up your children to break open letters," &c. And when the plaintiff states the innuendo (meaning the plaintiff), there is nothing in the antecedent part of the declaration to which the innuendo can point; there has been nothing ambiguous expressed which the innuendo can explain. The innuendo undertakes not to explain the terms, but to enlarge them. The count is therefore defective for want of a colloquium, and because the innuendo purports to enlarge the meaning of the words by applying them to matter not before stated.

The defendant is entitled to judgment on the demurrer, with leave to the plaintiff to amend on payment of costs.[62]

[62] Maxwell v. Allison, 11 Serg. & R. (Pa.) 343 (1824). Accord. Brashear v. Shepherd, Ky. Dec. 249 (1803); Dow v. Long, 190 Mass. 138, 76 N. E. 667 (1906). Contra. In Osborn v. Forshee, 22 Mich. 209 (1871), it was held that if the words are in the second person and spoken to the plaintiff and the declaration contains "of the plaintiff" no colloquium is necessary.

If words on their face refer to the plaintiff no inducement is necessary. Hurley v. Publishing Co., 138 Mass. 334 (1885); Young v. Cook, 144 Mass. 38, 10 N. E. 719 (1887). Nor is a colloquium necessary. Thirman v. Matthews 1 Stew. (Ala.) 384 (1828) semble; Davis v. Davis, 1 Nott. & McC. (S. C.) 290

CLEMENT v. FISHER.

(Court of King's Bench, 1827. 7 Barn. & C. 459.)

This was a writ of error from the Court of Common Pleas. The first count of the declaration stated, that on, &c, at, &c. one J. J. Stockdale, falsely, wickedly, and maliciously did print and publish of and concerning the plaintiff, a false, scandalous, malicious, and defamatory libel, containing, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the plaintiff, that is to say, &c. It then set out the libel published by Stockdale, which imputed gross misconduct to the plaintiff, and then stated, "that in Hilary term in the 6 & 7 G. IV, the plaintiff below brought this action against Stockdale for publishing that libel, and obtained a verdict and judgment for £700 damages; that the defendant well knowing the premises, but contriving, &c. to injure the plaintiff in his good name, and to cause it to be believed that the said libel was true, heretofore, to wit, on, &c. at, &c. falsely and maliciously did print and publish of and concerning the plaintiff, and of and concerning the said libel, and of and concerning the said verdict, a certain false, scandalous, malicious, and defamatory libel, containing the false, scandalous, malicious, defamatory, and libellous matter following; that is to say." It then set out the libel, upon which no question turned. The second count stated, "that the defendant further contriving, &c. on, &c. at, &c. falsely, wickedly, and maliciously did print and publish of and concerning the said plaintiff, and of and concerning the said first mentioned libel, and of and concerning the said verdict, a certain other false, scandalous, malicious, and defamatory libel, containing, among other things, the false, scandalous, malicious, defamatory, and libellous matter following; that is to say." It then set out the libel, which purported to be a dialogue between Stockdale and a person named Harriette. There was no

(1818); 2 Williams' Saunders Rep. 307a, notes 1 and d; and the cases just cited as to inducement.

If the words do not refer to plaintiff on their face an inducement is necessary. Mix v. Woodward, 12 Conn. 262, 280 (1837) semble; Warner v. Railway (C. C.) 112 Fed. 114 (1901: Tennessee law) semble; Butler v. Publishing Co., 135 Fed. 69, 67 C. C. A. 543 (1905: Florida law) semble; Goldsborough v. Orem, 103 Md. 671, 682, 64 Atl. 36 (1906) semble; Tyler v. Tillotson, 2 Hill (N. Y.) 507 (1842); Maxwell v. Allison, 11 Serg. & R. (Pa.) 343 (1824); Gordon v. Publishing Co., 81 Vt. 237, 69 Atl. 742 (1908). Accord. Miller v. Parish, 8 Pick. (Mass.) 384 (1829: colloquium alone enough); Dow v. Long, 190 Mass. 138, 76 N. E. 667 (1906: "of the plaintiff" alone enough). Contra.

It has been held that the lack of such an inducement as is required by the cases in the last paragraph is cured by verdict if the words "of the plaintiff" are in the declaration. Taylor v. How, Cro. Eliz. 861 (1601); Smith v. Ward, Cro. Jac. 674 (1624).

Obviously if it does not in any way appear that the words referred to the plaintiff the declaration is bad. Hanna v. Singer, 97 Me. 128, 53 Atl. 991 (1902); Sayre v. Jewett, 12 Wend. (N. Y.) 135 (1834); Cave v. Shelor, 2 Munf. (Va.) 193 (1811).

innuendo shewing that it related to the plaintiff, nor did it appear from the subject-matter to relate to him, nor did it appear necessarily to relate to the libel in the first count; but it alleged, that it would be hard to pay for truth, and that all which Harriette had written was in substance true. The defendant below pleaded not guilty. At the trial the jury found a general verdict for the plaintiff, with thirty pounds damages; and judgment having been entered up for the plaintiff generally on all the counts, the record was removed into this court by writ of error, and on a former day in this term the case was argued by

Platt for the plaintiff in error. The second count is bad, and the damages being general, the judgment must be reversed. The second count alleged, that the defendant "published of and concerning the plaintiff a libel containing the false and scandalous matter following." The libel was then set out; but it was not any where alleged that the matters in the libel were of and concerning the plaintiff, nor did it appear by the subsequent matter, nor was there any innuendo to connect the libellous matter with the plaintiff. Now, although the defendant may have published a libel concerning the plaintiff, it does not follow that the libel set out was concerning the plaintiff. That ought to appear either by averment or from the libel itself. He cited Rex v. Marsden, 4 M. & S. 164; The King v. Alderton, Sayer, 280; Johnson v. Aylmer, Cro. Jac. 126; Lowfield v. Bancroft, Strange, 934; The King v. Horne, Cowp. 682; Hawkes v. Hawkey, 8 East, 427; Com. Digest, tit. Action upon the Case for Defamation, G. 7.

Manning contra. The declaration states that the defendant published the libel of and concerning the plaintiff. In Rex v. Marsden, it was not alleged that the libel was published of and concerning the plaintiff. The count might have been bad on special demurrer, for not stating that the libellous matter was of and concerning the plaintiff, but is good after verdict, for the plaintiff could not have recovered a verdict unless it had been proved at the trial that the libel did relate to him. Stennel v. Hogg, 1 Saund. 226; Skinner v. Gunton, 1 Saund. 228c.

Cur. adv. vult.

Lord TENTERDEN, C. J. We are of opinion that the second count is bad. The first count of the declaration states, that the plaintiff had brought an action against one Stockdale for a libel, and obtained a verdict against him, and that the defendant contriving, &c. to injure the plaintiff, and to cause it to be believed that the libel was true published of and concerning the plaintiff a libel, which is set forth in that count. Upon that no question arises. The second count then proceeds thus: "The plaintiff further saith, that the defendant, further contriving and intending as aforesaid, heretofore, to wit, on, &c. falsely, &c. did print and publish of and concerning the plaintiff, and of and concerning said first mentioned libel, and of and concerning the

said verdict, a certain other false, scandalous, malicious, and defamatory libel, containing, among other things, the false, scandalous, malicious, defamatory, and libellous matter following; that is "to say," without alleging that the particular defamatory matter which was afterwards set out was matter of and concerning the plaintiff. Such an allegation would not have been necessary if there had been in the libel set out anything which clearly applied to the plaintiff, or any distinct innuendo so applying the libellous matter, or if, upon the perusal of the matter set out, it had manifestly appeared that it related to the libel in respect of which the plaintiff had recovered damages. But looking at the libellous matter set out in this count, we find the initial letters of Mr. Stockdale's name, and the name of Harriette, and the libel alleges that it would be hard to pay for truth, and that all that which Harriette had written was in substance true. Now, upon reading that matter, it seems to me quite impossible to say that it has any relation to the plaintiff or to the former libel. There is no averment that the particular matter is of and concerning the plaintiff, or any innuendo shewing that it related to the plaintiff, or anything in the matter itself manifestly shewing that it does relate to him. We are, therefore, of opinion, that the count is not good. The consequence is, that the judgment must be reversed, and a venire de novo awarded.

Judgment of the Court of Common Pleas reversed, and a venire de novo awarded.[63]

COLEMAN v. SOUTHWICK.

(Supreme Court of New York, 1812. 9 Johns. 45, 6 Am. Dec. 253.)

This was an action for a libel. The declaration stated that the plaintiff was a good and faithful citizen of the United States, and of good fame, etc., and pursued the occupation and employment of editor of a certain newspaper printed and published in the city of New York, called the "New York Evening Post," by which he acquired great gains and emoluments, etc. Nevertheless, the defendant well knowing the premises, but contriving and maliciously intending to injure and aggrieve the plaintiff in his good name, etc., and also in his occupation and employment, and to bring him into great scandal, infamy, and disgrace, and to cause it to be believed, etc., that the plaintiff had been guilty of the crime of treason, and of the promul-

[63] Lowfield v. Bancroft, Strange, 934 (1732: possibly accord, though seems that words "of the plaintiff" were left out).

The allegation that the words were published "of the plaintiff" is essential. Johnson v. Aylmer, Cro. Jac. 126 (1606); Lowfield v. Bancroft, Strange, 934 (1732); Brashear v. Shepherd, Ky. Dec. 249 (1803) semble; Dow v. Long, 190 Mass. 138, 76 N. E. 667 (1906) semble; Titus v. Follet, 2 Hill (N. Y.) 318 (1842); 1 Williams' Saunders Rep. 242 b, note 3; 1 Chitty, Pleading (13th Am. Ed.) *404. Accord.

gation of treasonable sentiments, and that the plaintiff had attempted to excite a civil war, etc., and was under the influence of an unprincipled devotion to Great Britain, etc., on the 3d October, 1809, at the city of Albany, wrote and published in a newspaper, printed and published by the defendant, called "The Albany Register," a certain false, scandalous and malicious libel, containing, among other things, the false, scandalous and malicious words and matters following. (Here the whole publication was set forth with innuendoes, but it is unnecessary, in reference to the decision of the court, to set forth the libellous paper and the other papers read at the trial, and inserted in the case.) * * *

The jury found a verdict for the plaintiff, for 1,500 dollars damages. * * *

KENT, C. J.[64] The defendant moved for a new trial upon the following grounds:

1. That the plaintiff ought to have been nonsuited at the trial. * * *

The declaration states, by way of inducement to the libel, that the defendant maliciously intending to bring the plaintiff into public scandal, and to cause it to be believed that he had been guilty of treason, and of promulgating treasonable sentiments, etc., published the libel. The counsel stated that these were averments requisite to have been proved upon the trial, and that for want of showing the existence of the charge of treason, the plaintiff ought to have been nonsuited. The answer is, that they are not such averments, but suggestions stated as mere inducement to the libel. It was not traversable matter any more than the ordinary preliminary suggestions in a declaration in slander, that the plaintiff is of good name, fame, etc. The averments requisite to give meaning and application to the libel, must be proved, and were proved in this case. The meaning of the libel and its application to the plaintiff were apparent on the face of the paper, and all that was required to support that meaning and that application, was the production of the paper, and the proof of its publication. The meaning imputed to it in the declaration, when the true meaning of the libel, and not the mere inducement to it, is averred, was obvious from the paper itself. * * *

I am accordingly of opinion that the motion, on the part of the defendant, be denied.

Motion denied.[65]

[64] Statement of facts abridged and part of opinion omitted.

[65] Thirman v. Matthews, 1 Stew. (Ala.) 384 (1828: statement by counsel not controverted) not even semble; Wilcox v. Moon, 63 Vt. 481, 485, 22 Atl. 80 (1891). Accord. Cooper v. Stone, 24 Wend. 434, 439 (1840) semble. Contra.

WEBSTER et ux. v. HOLMES.

(Supreme Court of New Jersey, 1898. 62 N. J. Law, 55, 40 Atl. 778.)

Action by Henry C. Webster and wife against James P. Holmes. Heard on demurrer to declaration. Demurrer sustained.

Argued February term, 1898, before LIPPINCOTT, GUMMERE, and LUDLOW, JJ.

LIPPINCOTT, J.[66] This action is brought by husband and wife against the defendant for slander against the wife. The declaration contains two counts, one in which the alleged slanderous matter is set forth against the wife with consequent damage to her. The second count is for damages to the husband by reason of such slanderous matter set out in the first count, against the wife, without any statement or repetition of such matter in such count. The demurrer to the declaration in this case is sought to be sustained upon several grounds: First, that the defamatory words used by the defendant concerning the female plaintiff are not set forth in either count of the declaration; and, secondly, that it is not averred in either count that the words complained of were falsely and maliciously spoken. There are other causes of demurrer assigned, which it has not been found necessary to consider.[67] * * *

The other ground considered is that in the narrative of the words spoken, contained in the declaration, the slanderous matter is not alleged to be defamatory, false, and malicious. This is equally effective as a ground of demurrer. False defamatory words spoken constitute slander, and they are only actionable when false and malicious. It is necessary, in order that the pleading be not demurrable, that not only the words must be set forth, but in some form or other it must be averred that they were false and malicious. It may not be material to the sufficiency of the declaration in what form the falsity or maliciousness be stated, but it has always been understood that the declaration must charge the falsehood or maliciousness of the slanderous words or terms used. In some form or other, these essentials of proper pleading must appear, and no better averment than that laid down in the books of pleading can be employed—that is, that the words were defamatory, false, and malicious; and no good reason can be perceived for departing from these well-recognized and established forms. Bottomly v. Bottomly, 80 Md. 159, 30 Atl. 706; White v. Nicholls, 3 How. 266, 11 L. Ed. 591; 12 Am. & Eng. Enc. Law, 473, 474, and cases cited. Malice, either in fact or in law, is essential to the action, and consequently a corresponding allegation is essential to a complete declaration. This seems to be the rule under all the authorities With

[66] Part of the opinion omitted.

[67] The court held the declaration bad on the ground that the words should have been alleged.

the averment of the falsity of the charge, malice may be inferred; and so, too, under the averment of malice the falsity of the charge may be inferred. While the plaintiff is not bound in terms to deny the specific charge imputed to him, nor the particular facts alleged in the charge, it is necessary to aver that the words were maliciously spoken. The averment, "Hæc falsa, ficta, malitiosa verba," is required in some form, and this is all that is required. Bendish v. Lindsey, 11 Mod. 194. There are cases in which it has been held that the falsity of the words used need not be charged in terms, but an examination of these cases will reveal that they passed upon the ground that the fault was cured after verdict, or upon the ground that expressions or averments were used in the pleadings from which the ingredients of falsity and malice could be fairly inferred, and thus the pleading was only subject to the criticism of being unadroit or untechnical. Newell, Sland. & L. p. 612, and cases cited. Any form of words will suffice from which the malicious intent can be inferred. It has been held to be sufficient to aver that the defendant spoke the words or published the libel falsely or wrongfully, or that the defendant "machinas periorare dixit." Moore, 459; Owen, 51; Noy, 35; Danv. Abr. 166. The averment, in some form, that the words were spoken falsely and maliciously, must be contained in the declaration. Starkie, Sland. & L. 433; Morrison's Case, Sheppard Act. 267; Sutton v. Johnstone, 1 Term R. 493. It has always been held that there should be an averment that the defendant maliciously published the matter, but any equivalent expression, as wrongfully and falsely, will suffice. Saund. Pl. & Ev. 242. The presumptions arising upon proof in the trial of the cause do not apply to the pleading. The declaration in this case is barren of averments of the necessary ingredients of a proper declaration, and therefore on both grounds demurrable. The demurrer is sustained, with costs.[68]

[68] As to falsity: Bendish v. Lindsay, 11 Mod. 194 (1709) semble; Bromage v. Prosser, 4 B. & C. 247, 55 (1825) semble; Ivey v. Co., 113 Ala. 349, 360, 21 South. 531 (1896) semble; Bottomly v. Bottomly, 80 Md. 159, 30 Atl. 706 (1894); Rice v. Albee, 164 Mass. 88, 41 N. E. 122 (1895); Belknap v. Ball, 83 Mich. 583, 47 N. W. 674, 11 L. R. A. 72, 21 Am. St. Rep. 622 (1890); Cooper v. Stone, 24 Wend. (N. Y.) 434, 439 (1840) semble. Accord. Anonymous, Style, 392 (1652); Lamplew v. Hewson, Style, 435 (1654); King v. Burks, 7 D. & E. 4 (1796; criminal case). Contra.

As to malice: Ivey v. Co., 113 Ala. 349, 360, 21 South. 531 (1896) semble; Belknap v. Ball, 83 Mich. 583, 47 N. W. 674, 11 L. R. A. 72, 21 Am. St. Rep. 622 (1890); O'Donaghue v. McGovern, 23 Wend. (N. Y.) 26, 31 (1840) semble; White v. Nicholls, 3 How. 266, 284, 11 L. Ed. 591 (1845) semble; Dillard v. Collins, 25 Grat. (Va.) 343, 350 (1874) semble. Accord. Mercer v. Sparks, Noyes, 35 (1586); Bromage v. Prosser, 6 Dow. & Ry. 303 (1825) semble; King v. Root, 4 Wend. (N. Y.) 114, 136, 21 Am. Dec. 102 (1829) semble. Contra.

DECLARATION FOR MALICIOUS PROSECUTION.

(Encyclopedia of Forms. Forms No. 13,415 and No. 6,951.)

——— Court of the County of ———, to wit, ——— Rules, 18—. ——— complains of ———, who has been summoned to answer the said plaintiff of a plea of trespass on the case. For this, to wit, that on the ——— of ———, 18—, at ———, ———, the defendant went before one ———, a United States commissioner for the ——— district of ———, and then and there before said ——— falsely and maliciously and without any reasonable or probable cause whatsoever, charged plaintiff with having feloniously stolen or taken from out of a mail of the United States a certain registered letter received by plaintiff as postmaster at ———, ———, on or about the ——— day of ———, 18—, and upon such charge the defendant falsely and maliciously and without any reasonable or probable cause whatever, caused and procured said ———, United States commissioner as aforesaid, to make and grant his certain warrant under his hand for the apprehending of plaintiff and for having plaintiff before him, the said ———, or some other United States commissioner, to be dealt with according to the law of said supposed offense, and said defendant, under and by virtue of said warrant, afterwards, to-wit: ———, 18—, at ——— county, ———, aforesaid, wrongfully and unjustly and without any reasonable cause whatsoever, caused plaintiff to be arrested by his body and taken into custody and to be imprisoned and brought by public conveyance from ———, ——— county, to ———, ———, in the custody of a deputy marshal of the United States, and before a great many people in the public highway and the streets of ———, and to be detained in custody a long space of time, to-wit: ——— hours then next following and until defendant afterwards, to-wit: ———, 18—, at ———, ———, falsely and maliciously and without any reasonable or probable cause whatsoever, caused the plaintiff to be carried in custody before said ———, so being United States commissioner as aforesaid, to be examined before said commissioner, of and concerning said supposed crime, which said commissioner, having heard and considered all that said defendant could say or allege against the plaintiff touching said supposed offense, then and there, to-wit: on the day last aforesaid, at ———, ———, adjudged and determined that the said plaintiff was not guilty of the said supposed offense, and then and there caused the plaintiff to be discharged out of custody, fully acquitted and discharged of the said supposed offense, and the defendant hath not further prosecuted his said complaint, but hath deserted and abandoned the same, and the said complaint and prosecution is wholly ended and determined, to-wit: at ———, ———, aforesaid; to the plaintiff's damage ——— dollars. And therefore he brings his suite.

FINDLEY v. BULLOCK.

(Supreme Court of Indiana, 1818. 1 Blackf. 467.)

Appeal from the Clark Circuit Court.

HOLMAN, J.[69] * * * The action is for a malicious prosecution. The declaration states that the plaintiff was arrested and brought before a justice of the peace on a charge of felony, on the 29th of July, 1816; and, after being detained for a space of twelve hours, was, on the same day, acquitted, which was the termination of the prosecution of which the plaintiff complained; and this action was commenced the same day. * * *

The declaration states that the charge was made before "John Beggs, Esquire, then and there being one of the justices assigned to keep the peace of, in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors," &c. And on the ground that justices of the peace have no such power to hear and determine divers felonies, trespasses, and misdemeanors, the defendant has assigned this part of the declaration as a third reason why the judgment should be reversed. It is unnecessary to inquire whether or not such power is attached to the office of the justice of the peace, for John Beggs is sufficiently described as a justice of the peace, without those expressions. They are merely surplusage, and the declaration would be unexceptionable in this part of it, if they were stricken out. * * *

PER CURIAM. The judgment is affirmed, with 5 per cent. damages and costs.[70]

PIPPET v. HEARN.

(Court of King's Bench, 1822. 5 Barn. & Ald. 634.)

Action on the case for a malicious prosecution for perjury. The declaration contained two counts, the first of which set out the indictment for perjury, which had been preferred against the defendant [plaintiff?]; by which it appeared, that a certain cause had been depending in the King's Bench, between Bridges and Hearn, and that such proceedings were had that a writ of enquiry was duly issued out of the said court, directed to the sheriffs of London, to enquire, &c., and that the said sheriffs should make appear the inquisition which they should take thereof, before the justices of our said lord the king, at Westminster. The indictment then set out the taking of the in-

[69] Part of the opinion omitted.

[70] It must appear that proceedings were had in a judicial tribunal. Sheppard v. Furniss, 19 Ala. 760 (1851); Haskins v. Ralston, 69 Mich. 63, 37 N. W. 45, 13 Am. St. Rep. 376 (1888) semble; Drew v. Potter, 39 Vt. 189 (1867).

quisition before the Secondary, and alleged the perjury of the plaintiff, as having been committed on that occasion.

The second count of the declaration did not set out any indictment, but merely stated, that defendant, at a general session of oyer and terminer of our said lord the king, holden for the city of London, at the Justicehall, in the Old Bailey, within the parish of, &c., maliciously, and without any reasonable or probable cause whatsoever, indicted and caused, and procured to be indicted, the said plaintiff, for wilful and corrupt perjury, &c. Plea, general issue. At the trial, at the last Guildhall sittings, before Abbott, C. J., the plaintiff obtained a verdict, damages £150. And now,

Platt moved to arrest the judgment. Both counts are defective. By the first it appears, that the alleged perjury was committed coram non judice; for the writ of enquiry was issued out of the King's Bench, and made returnable in the Common Pleas. The Secondary had, therefore, no jurisdiction to administer the oath. The second count is too general. The indictment must be set out, and here it is only stated, that the defendant maliciously indicted the plaintiff for wilful and corrupt perjury. In Com. Dig. tit. Action on the case for a conspiracy, C. 4., it is laid down, that the declaration must shew a good indictment, otherwise he cannot be lawfully acquitted; and Sherington v. Ward, Cro. Eliz. 724, is also in point. It would be bad to say that the defendant maliciously indicted the plaintiff for felony; for, by such a general statement, the defendant cannot know what the charge against him is.

PER CURIAM. There may be a distinction between the cases put of felony and perjury; the former may embrace a variety of charges, but perjury is one distinct species of crime.[71] But, at all events, this count is sufficient after verdict. As to the first count, that is also good; for we are of opinion, that, where a man maliciously prefers an indictment against another for a crime, he is liable to an action for it, although the indictment be defective; for, in either case, whether the indictment be good or bad, the plaintiff is equally subjected to the disgrace of it, and put to the same expense in defending himself against it.[72]

Rule refused.

[71] The charge on which the defendant prosecuted the plaintiff must be stated. Tempest v. Chambers, 1 Starkie, 67 (1815); Hughes v. Ross, 1 Stew. & P. (Ala.) 258 (1832); Stephens v. Stephens, 24 U. C. C. P. 424 (1874); Riley v. Gourley, 9 Conn. 154, 161 (1832) semble; Turpin v. Remy, 3 Blackf. (Ind.) 210 (1833); Barry v. Co., 14 Phila. (Pa.) 124 (1880); Tavenner v. Morehead, 41 W. Va. 116, 23 S. E. 673 (1895). Accord. Goldsmith v. Picard, 27 Ala. 142, 149 (1855) semble. Contra.

A simple statement of the crime charged is sufficient. Turpin v. Remy, 3 Blackf. (Ind.) 210 (1833); Bartlett v. Jennison, 6 Blackf. (Ind.) 295 (1842) semble. Accord. Long v. Rogers, 17 Ala. 540 (1850). Contra.

A slight variance from the charge alleged is immaterial. Hughes v. Ross, 1 Stew. & P. (Ala.) 258 (1832); Richards v. Foulks, 3 Ohio, 66 (1827); Armstrong v. Grogan, 5 Sneed (Tenn.) 108 (1857). Accord. McNamee v. Minke, 49 Md. 122, 130 (1878). Contra.

[72] Jones v. Gwynn, 10 Mod. 214 (1714); Forrest v. Collier, 20 Ala. 175, 56

PERDU v. CONNERLY.

(Court of Appeals of South Carolina, 1838. Rice, 48.)

This was an action against the defendant, for causing a groundless prosecution to be set on foot against the plaintiff, for stealing a pair of martingales.

CURIA, per O'NEALL, J.[73] The ground in arrest of judgment is a very general one, and under it, the counsel has presented many objections. It will hardly be necessary to follow him through them all They may be classed under two heads—defects in substance, and in form. As to the last, if there be any such (which I have been unable to discover,) it will be enough to say, that all such are aided by verdict. As to the first, I hope to be able, in a very summary way, to satisfactorily dispose of them. Under this head, the defendant contended, 1st, that as the plaintiff had set out the information made by Ruff, charging the felony, he showed good cause for the prosecution, and therefore he had stated himself out of court. If the plaintiff had been guilty of the egregious folly by his record to admit that information to be true, or that the defendant confiding in it, had set on foot the prosecution, then this objection would have been fatal: but, on looking at the declaration, it appears that it charges that the defendant contriving and maliciously intending to injure the plaintiff, &c. procured one F. C. Ruff to appear before the defendant, a justice of the peace, and falsely[74] and maliciously,[75] and without any reasonable or probable cause whatever,[76] to make oath, &c. In this, the act done by Ruff is charged to have been false, malicious, and without probable cause, and to have been procured to have been thus done by the defendant, maliciously. There is nothing like an admission of probable cause in this. The defendant is liable for Ruff's act, as done by his procurement; for, in trespass, all who are concerned in any way, are principals.[77]

2. It was contended that it was necessary to allege that the defendant knew that Ruff had no reasonable or probable cause for the charge. This is in effect charged when he is charged with having of his malice

Am. Dec. 190 (1852); Schattgen v. Holnback, 149 Ill. 646, 654, 36 N. E. 969 (1894); Gibbs v. Ames, 119 Mass. 60 (1875). Accord. Stephens v. Stephens, 24 U. C. C. P. 424 (1874). Contra.

But if on the charge as alleged the court would have had no jurisdiction to act at all then the declaration is bad. Bixby v. Brundige, 2 Gray (Mass.) 129, 61 Am. Dec. 443 (1854).

[73] Statement of facts abridged and part of opinion omitted.

[74] That this is material see Barry v. Salt Co., 14 Phila. (Pa.) 124 (1880) hardly a semble; Tavenner v. Morehead, 41 W. Va. 116, 120, 23 S. E. 673 (1895) hardly a semble.

[75] For many cases holding this essential see 13 Pl. & Pr. 442; 26 Cyc. 75.

[76] For many cases holding this essential see 26 Cyc. 74; 13 Pl. & Pr. 436.

[77] That the defendant instituted or is responsible for the institution of the proceedings is a necessary allegation. Apgar v. Woolston, 43 N. J. Law, 57 (1881) semble; Jones v. Finch, 84 Va. 204, 4 S. E. 342 (1887) semble.

procured a false and groundless charge to be made. But if it is not sufficiently charged, the proof was ample to that point on the trial, and after verdict a defective allegation will be aided. See note d. 1 Chit. Pl. 251–252.

3. It was supposed that the description of the indictment was not sufficient. The general rule of pleading is, that "all the circumstances necessary for the support of the action should be stated." 1 C. P. 255. What circumstances were necessary to be stated in this case? 1st, The agency of the defendant in causing Ruff to make a false charge; 2d, the charge thus made; 3d, the arrest of the defendant [78]—his commitment, or enlargement on bail, to answer the charge; 4th, the presentation of the bill to the grand jury—their action by ignoring it; and 5th, the discharge of the plaintiff, and the averment that the prosecution was thus ended.[79] This declaration contains all these things; and on being read consecutively, we know that the indictment was presented on the charge made by Ruff; for, it is described thus: "A bill of indictment was presented on the charge aforesaid." In setting out a fact of this kind in the declaration, no greater degree of certainty than "certainty to a certain intent in general," could be demanded. 1 C. P. 237. That which "upon a fair and reasonable construction may be called certain, without recurring to possible facts which do not appear," is the degree of certainty meant and required. Test the declaration by this rule, and read it, as I have said already, consecutively, and all uncertainty in the description is at an end.

This court has been unable to discover any error in the charge of the judge below. The facts went properly to the jury, and they abundantly justified them in finding the verdict which they did. The motions are dismissed.

GANTT, EVANS, RICHARDSON, EARLE, and BUTLER, Justices.

DECLARATION FOR DECEIT.

(2 Chitty, Pleading [13th Am. Ed.] pp. *596, *687.)

In the Common Pleas.

——— next after ——— in ——— Term, ——— Will. 4.

——— (to wit) C. D. was attached to answer A. B. of a plea of trespass on the case, and thereupon the said A. B. by E. F. his attorney,

[78] Williams v. Ivey, 37 Ala. 244 (1861). Accord. Pangburn v. Bull, 1 Wend. (N. Y.) 345, 350 (1828). Contra. If the action is for a malicious arrest, the arrest is a material allegation. Reach v. Quinn, 159 Ala. 340, 48 South. 540 (1909).

[79] For many citations accord see 26 Cyc. 76, 77; 13 Pl. & Pr. 444.

The allegation of conspiracy commonly found in declarations for malicious prosecution is unnecessary. Garing v. Fraser, 76 Me. 37, 41 (1884); Hamilton v. Smith, 39 Mich. 222, 231 (1878); Kirtley v. Deck, 2 Munf. (Va.) 10, 22, 5 Am. Dec. 445 (1811).

complains for that whereas the said plaintiff, on, &c. (venue) bargained with the said defendant to buy of him a certain piece or parcel of ground of the said defendant called, &c. situate and being in the parish of ——— in the county of ——— and the said defendant then and there, to wit, at, &c. (venue) aforesaid, well knowing the said close to contain a much less quantity than (three acres) of land, to wit, the quantity of (two acres and a half) of land only, by then and there, to wit, at, &c. (venue) aforesaid, falsely and fraudulently warranting the said close to contain (three acres) of land, then and there, to wit, at, &c. (venue) falsely, fraudulently, and deceitfully, sold the said close to the said plaintiff, at and for a certain sum of money, to wit, the sum of £———. of lawful money of Great Britain to be therefor paid by the said plaintiff to the said defendant, and which was then and there, to wit, at, &c. aforesaid, accordingly paid for the same; whereas in truth and in fact the said close, so as aforesaid sold by the said defendant to the said plaintiff, did not contain (three acres) of land, but on the contrary thereof, contained a much less quantity than (three acres) of land, to wit, the quantity of (two acres and a half) only; by means of which premises the said plaintiff lost great gains and profits which he otherwise would have made and derived from the purchase of the said close, and was put to great charge and expense, to wit, at, &c. (venue); and so the said plaintiff in fact saith, that the said defendant, on, &c. aforesaid, falsely and fraudulently deceived him, to wit, at, &c. aforesaid. Wherefore the said plaintiff saith that he is injured, and hath sustained damage to the amount of £———., and therefore he brings his suit, &c.

PFORZHEIMER et al. v. SELKIRK et al.

(Supreme Court of Michigan, 1888. 71 Mich. 600, 40 N. W. 12.)

Case. Plaintiffs bring error. Affirmed. The facts are stated in the opinion.

SHERWOOD, C. J. This action was brought by the plaintiffs against the defendants to recover damages alleged to have been sustained by the plaintiffs by means of the fraudulent acts and pretenses of the defendants, by which the plaintiffs were induced to accept 33⅓ per cent. of their claim against the firm of Alfred T. Selkirk and James L. Whitford, in full settlement of such claim. The allegations and averments in the declaration are as follows:

The defendants Selkirk and Whitford were a firm, and for some time previous to December 17, 1885, were engaged in the business of retail dealers in silver and jewelry and plated ware, in the city of Charlotte, in Eaton county, and were at that time indebted to the plaintiffs in the sum of $623.99, which was then due to said plaintiffs, and which they had requested the said firm to pay, but they had re-

fused. The plaintiffs aver that at this date the firm was doing a safe and prosperous business, and that their stock of goods would then have inventoried at the cost price from $8,000 to $10,000, and against which there was no incumbrance. Plaintiffs further aver that, the defendants fraudulently intending to deceive the plaintiffs, on the 18th day of December, 1885, the defendants Selkirk & Whitford gave a mortgage to the defendant Almeda Whitford upon all their stock of jewelry, merchandise, and fixtures for the payment to her of the sum of $2,886.45 on or before the 1st day of March, 1886; and the said firm of Selkirk & Whitford on the same day gave another mortgage, purporting to be subject to the other, on the same property, to defendant John Levy for the payment of $2,000 on or before the 28th day of December, 1885; and that both of said mortgages were duly recorded in the city of Charlotte. That the said Selkirk & Whitford, after contriving together with said Almeda Whitford and John Levy, and with the intention to cheat and defraud the said plaintiffs, did, on the 26th day of December, 1885, make an assignment of all their property, except that which was exempt from execution, which they owned, to Eliza Flora, for the benefit of the creditors of Selkirk & Whitford, and filed the same with the clerk of Eaton county. That, including said mortgages, it was made to appear by the assignment that said firm's total indebtedness was $16,740.82, and the assets so assigned were appraised at $4,248.22. That on the 13th day of March, 1886, said indebtedness then being due and owing to the plaintiffs from the said firm, the defendants, well knowing the premises, falsely and fraudulently represented to the plaintiffs that said firm were wholly insolvent and unable to pay any part of these debts. That said mortgages were made and delivered in good faith, and for the consideration expressed, and were valid subsisting liens upon the property therein described. That the assignment was made in good faith, and without preferences. And the plaintiffs further aver that they, "confiding in said defendants, and the representations made to them by the defendants, as aforesaid, and the facts set forth in the chattel mortgages and said assignment," afterwards, on the 13th day of March, 1886, did agree with the said Selkirk & Whitford and the other defendants to release and discharge the plaintiffs' indebtedness to said firm by the payment by said Levy to plaintiffs of the sum of 33⅓ per cent. of the said claim, and at the request of the defendants they assigned their said claim to defendant Levy, receiving such payment therefor. And plaintiffs further aver that said mortgages were not made in good faith, nor was either of them a valid and subsisting lien upon the property described, and was well known so to be by the defendants. That they were not given to secure any indebtedness of said firm, but to hinder and delay plaintiffs in the collection of their debt, and the assignment was not made in good faith, and was not of all the assignors' property, and was not made without preferences, and was fraudulent

and void, and was made with the fraudulent design to obtain a release of the claims against said firm at a less sum by far than was due thereon. That at the time of the assignment to Levy said firm owned, in its own right, a large amount of other property and goods and choses in action and money, held by some other person for them, to the amount of $25,000, not mentioned in the assignment, and which said firm fraudulently concealed from the plaintiffs. And they further aver that said defendants represented to plaintiffs that the money paid on said release was the money of said Levy. And they further aver that said money was not Levy's, but that of said firm, and that this fact was known to all the defendants, and that by such fraudulent representations and concealments of defendants they have been damaged to the amount of $2,000.

The foregoing is the substance of the first count in the declaration, and the second count sets up the same representations and facts, which are relied upon to mantain the action in the first count. To the declaration the defendants Selkirk & Whitford pleaded the general issue.

The defendants Almeda Whitford and John Levy appeared separately in the cause, and each filed a general demurrer to the declaration. The demurrers were argued before Judge Hooker, who made the following decision in the case:

"The declaration is in case, charging defendants with combining, and by means of certain false pretenses and tokens inducing the plaintiffs, who were creditors of defendants Selkirk and James L. Whitford, to assign their claim to defendant Levy for a sum much less than its face. A declaration of this kind should show: First, that the representations were made by all the defendants, or that by reason of their collusion they may be treated as participating in them; second, that they were made with the design of influencing the defendants' [plaintiffs'?] conduct; third, that they were believed to be true by plaintiffs, and were relied upon by them, and that they induced the desired action on their part; fourth, that the representations were known to be untrue by the defendants when made; fifth, that the plaintiffs suffered damage from the action that they were induced to take, which, being special, should be specially pleaded; sixth, that the damage followed proximately the deception. As the declaration fails to sufficiently state these things, the demurrers will be sustained, with costs, to be taxed. Plaintiffs may file an amended declaration within thirty days, upon payment of costs."

Judgment was entered according to the foregoing conclusions, and the plaintiffs bring the case to this court by writ of error.

It is only the sufficiency of the declaration, as against the defendants Almeda Whitford and John Levy, that is now before us for consideration. We think the circuit judge made a proper disposition of these demurrers. It appears from the record that Mrs. Whitford's mortgage was made on the 18th day of December, 1885, and the

same day the other was made to Mr. Levy; that on the 26th day of the same month the assignment of the property was made to Eliza Flora, and not until the 13th day of March thereafter the alleged fraudulent transaction occurred which is made the subject of this action. It is the fraudulent obtaining the settlement of the plaintiffs' claim for 33⅓ cents on the dollar that constitutes the grievance in this case complained of; and there is no averment in the declaration that the mortgages and assignment were made with the knowledge of the parties demurring, for any such purpose, nor that the making of the mortgages was a part of the same transaction had by defendants Levy and Mrs. Whitford with a view to bringing about the claimed fraudulent compromise. It must be recollected the indebtedness claimed against these demurring defendants was not contracted by reason of the alleged false representations, or of any representations made by said defendants demurring. They were under no legal or equitable obligation to pay the debt compromised, or any portion thereof; and, had they made all the representations charged in regard thereto, they could not have been made liable. Especially must this be so as long as the declaration does not allege that the plaintiffs were not ignorant of the facts represented, and there is no averment in the declaration that the plaintiffs were misled by the representations, whatever they were. The representations are alleged to have been made by Selkirk and Mr. Whitford, and it is not averred that plaintiffs believed them. It is not sufficient to charge a person with cheating and defrauding another only, or with contriving and confederating with others to defraud, to make out a case of fraud, but the declaration must definitely and issuably set forth the facts complained of, relied upon for a recovery; and a declaration alleging as the cause of action false statements, where there is more than one defendant, should aver a conspiracy, and enumerate the false statements and the circumstances which are supposed to create the liability, with particularity; and, if not made by all the defendants, it should be averred that they all colluded and conspired together in such manner that the false representations by those who did not participate in making them were authorized by them, and in furtherance of the common design and fraudulent purpose. It should also be averred that the false statements were believed to be true by the plaintiffs, and, thus believing, were relied upon by them, and that they induced the action taken by the plaintiffs [80] which resulted in damage to them. In examining this declaration, we find an absence of nearly all of these essential requisites, so far as it relates to the defendants, and we think their demurrers must be sustained.

The judgment at the circuit will therefore be affirmed. The other justices concurred.

[80] Windram v. French, 151 Mass. 547, 24 N. E. 914, 8 L. R. A. 750 (1890) semble; Parker v. Armstrong, 55 Mich. 176, 20 N. W. 892 (1884); Ide v. Gray, 11 Vt 615 (1839). Accord. See further 20 Cyc. 102; 6 Pl. & Pr. 906.

WEST v. EMERY.

(Supreme Court of Vermont, 1845. 17 Vt. 583, 44 Am. Dec. 356.)

Trespass on the case for deceit in the sale of a horse. The declaration was in two counts, and alleged that the defendant falsely warranted the horse to be sound, except a lameness occasioned by being corked,—which was then apparent,—and that the defendant, at the time of making the warranty, knew that the warranty was false.

On the trial the plaintiff's testimony tended to prove, that, while the negotiation for the exchange of horses, as alleged in the declaration, was pending, the plaintiff asked the defendant if he would warrant his horse to be sound, and that the defendant replied, that he would not warrant any horse sound, but that "his horse was sound, as far as he knew, except the cork." and that in fact the horse was unsound, and had the heaves badly, and that this was well known to the defendant and was not known to the plaintiff, and that the defendant's representation was made with a view to deceive the plaintiff, and that he was thereby deceived. The defendant's counsel objected to the testimony being received, on the ground of a variance between that and the declaration, and, the court entertaining doubts, the plaintiff obtained leave to file an additional count, under a rule, that, if he recovered only on that count, he should recover no back costs and should pay the defendant's costs to that time, with leave to save exceptions, if the court should decide against him.

The jury returned a verdict for the plaintiff, and the court decided that the plaintiff was entitled to judgment upon his two first counts, and that there was no variance between the testimony, as above detailed, and the second count; to which decision the defendant excepted.

The opinion of the court was delivered by

REDFIELD, J. The only question in this case is one of variance, that is, whether the plaintiff is entitled to judgment on his two first counts, or only upon the third count. This question is important only, it will be perceived, in regard to the amount of costs,—the last count having been filed during the final trial, under a rule that, if the plaintiff "should only recover upon his new count, he should recover no back costs, and pay costs to that time." The county court held that the plaintiff was entitled to judgment on the two first counts, and we are now called upon to revise that decision. The counts are all, substantially, for a false warranty and fraud thereby, alleging the scienter,—as in the case of Beeman v. Buck, 3 Vt. 53, 21 Am. Dec. 571. This last case is based mainly upon the case of Williamson v. Allison, 2 East, 446. Under a declaration in this particular form it has been the practice in England, for more than fifty years, and in this state for nearly twenty years, to admit proof either of an express promise, or fraud. The plaintiff may still declare upon an express promise merely, without alleging fraud,—in which case he will be

bound to prove an express warranty, as alleged, and cannot establish his right of recovery by proof of fraud merely.

The only difference in the counts in the present case is, that the first two counts allege a general warranty of soundness, with a specified exception of a particular defect, and the breach that the defendant well knew the horse to be otherwise unsound, lame, &c., and that this was the fact; and the last count alleges a false warranty of soundness as far as the defendant knew, with the same exception named in the first two counts, and alleges the same breach, precisely, as in the former counts. The proof precisely corresponded with the words of the last count, and the inquiry is, whether it does not substantially agree also with the first two counts.

1. We readily perceive, that, when the plaintiff relies upon proof of an express warranty, and alleges merely, as a breach, that the fact warranted did not exist,—which, in such case, will always entitle the plaintiff to recover,—there is a manifest difference between a warranty absolute in its terms, and a mere warranty of soundness to the extent of the defendant's knowledge; and a declaration upon an express warranty merely, absolute in its terms, would not be supported by the proof in the present case.

2. But when the defendant [plaintiff?] relies, as he did here, upon false and fraudulent representations merely, we do not perceive that there is any difference, so far as liability is concerned, whether the representation is that the horse is absolutely sound, or only that he is sound so far as the defendant knows. The defendant is not liable upon either of these representations, unless, at the time, he knew the horse to be unsound; and if he did then know this fact, he is equally liable, and to the same extent, on both or either of the representations.

It is the breach of a contract, to which we look to determine its identity; and when the same state of facts does not constitute equally a breach of the contract alleged in the declaration, and that proved on trial, there is a variance; so when the gist of the action is tort in the making false representations knowingly, the inquiry, as to the identity of averment and proof, turns on the corresponding point, that is, whether the same proof constitutes equally a fraud under the averment and the representation as in fact made. That, in the present case, is very obvious.

Judgment affirmed.[81]

[81] Parker v. Armstrong, 55 Mich. 176, 20 N. W. 892 (1884); Lummis v. Strattan, 2 N. J. Law, *245 (1807); Addington v. Allen, 11 Wend. (N. Y.) 374, 404, 412 (1833); Cutter v. Adams, 15 Vt. 237, 242 (1843). Accord. See, further, 8 Pl. & Pr. 900.

FOWLER v. BENJAMIN.

(Court of Queen's Bench, 1859. 16 U. C. Q. B. 174.)

Declaration: That the plaintiff, before the committing of the grievances by the defendant as hereinafter mentioned, applied to the defendant to be by him informed of the credit and circumstances of Isaac Lewine and Lyon Lewine, who were then doing business together at Toronto, under the style and firm of I. & L. Lewine, and who had before then applied to the plaintiff, and requested him to furnish them with goods on credit; and the defendant, in reply to the said application of the plaintiff, afterwards, and before the commencement of this suit, wrongfully and falsely informed the plaintiff that the said Isaac Lewine and Lyon Lewine were then worth from four to five thousand pounds between them, out of which they owed one Moss, and the defendant and his co-partners, the sum of £1000; (and also that they, the defendant and his co-partners, had sold to the said I. & L. Lewine that spring, for Toronto and Quebec, over twelve hundred pounds currency, the notes for which were being paid as they matured, and that the defendant and his co-partners had that autumn imported six hundred pounds sterling for the said I. & L. Lewine). And the plaintiff, in consequence of this information, and believing the same to be true, did afterwards, and before the commencement of this suit, sell and deliver to the said Isaac Lewine and Lyon Lewine certain goods and merchandise, amounting in value to a large sum of money, to wit, to £600., whereas, in truth and in fact, the said Isaac Lewine and Lyon Lewine, at the time of the defendant so giving the information to the plaintiff as aforesaid, were not worth from four to five thousand pounds, and the defendant then well knew the same, and the said Isaac Lewine and Lyon Lewine were not then indebted to the said Moss and the defendant, and his co-partners, in the said sum of £1000., exclusively of the said arrears of £1200. currency, and £600. sterling, so sold and imported as aforesaid, but in a much larger sum—that is to say, the sum of £3000.—which the defendant well knew: and the plaintiff further saith, that though the time for which he gave credit to the said Isaac Lewine and Lyon Lewine for the goods sold to them as aforesaid has elapsed, yet they have not paid the plaintiff the amount due for the said goods, nor any part thereof, and still are unable to pay the same, and the amount thereof is likely to be wholly lost to the plaintiff. And the plaintiff claims one thousand pounds.

Demurrer, that the declaration is bad, because the allegation negativing the statement of the defendant's representations is more extensive than the representation itself.

Robinson, C. J., delivered the judgment of the court.

The single exception pointed out in the demurrer, is that the averment negativing the truth of the defendant's representation is more

extensive than the representation itself. This may or may not be an objection, according to the nature of the negative averment. In some cases the exception would be unreasonable and idle. What is alluded to here is, that the declaration states the defendant to have represented that Isaac and Lyon Lewine were then worth from four to five thousand pounds between them, whereas the fact is stated to have been that they were not then worth from four to five thousand pounds, without adding the words "between them."

We do not take that to be a substantial variance, especially considering the circumstances which are set forth. The first statement no doubt refers to the credit or worth of the firm, but includes also, as we assume, what either of them individually would be worth, as in the case of an ordinary partnership all the property of both and of each would be liable to satisfy the partnership debts. But the assertion in the latter part of the statement would, we think, go the whole extent of the former, for Isaac Lewine and John [Lyon?] Lewine together would be worth whatever they owned either as copartners or individually, in this sense, that though they would not own jointly the separate private property of each, yet the private property of each would constitute a fund to which their creditors could look for payment; and we think we should regard the words in the latter statement as used in such a sense as to deny the truth of the former, being in fact co-extensive.

But if that part of the declaration were clearly bad, it would not affect the rest of the count, if there is in it besides a sufficient statement of an independent cause of action; and this we think there is, as regards the misrepresentation of the amount of the Messrs Lewines' indebtedness to Moss and the defendant and his partners.

Then as to that part of the count, it seems to us the plaintiff, when he avers that the Lewines were not then indebted to Moss and the defendant and his co-partners in £1000., should have added the word only, or something equivalent to it; but what strikes us as strange and inconsistent with this action in the statement as it stands, is clearly enough explained by the addition of the words, "but in a much larger sum, viz.," &c.

We see on the face of the whole statement that the plaintiff has not simply denied that the Lewines were indebted in £1000., but in that sum and no more. The intent is too plain to make an inaccuracy of that kind of any consequence now, and we do not think that this exception would have appeared formidable on a special demurrer.[82]

The more substantial exception is, that the declaration does not aver that the defendant made his representation fraudulently or maliciously, or with the intent to deceive.

We have looked into all the cases cited by the counsel on that

[82] Stoflet v. Marker, 34 Mich. 313 (1876); Byard v. Holmes, 34 N. J. Law, 296 (1870). Accord. See, further, 20 Cyc. 99; 8 Pl. & Pr. 899.

point, and into others, and we have no doubt that the declaration states a good cause of action.

It is averred that the defendant wrongfully and falsely made a statement in regard to the credit of the Lewines, and the amount in which they were indebted to himself and his partners and to Moss, which he knew at the time to be false.

To make wrongfully and knowingly a false statement of the amount of a party's indebtedness to the very person of whom the inquiry is made, is in itself a fraud. We mean, the allegation includes it so clearly as to make it unnecessary to apply the epithet.[83]

The distinction, as we take it, is between cases in which the party may be supposed to be expressing his opinion or conviction merely, and not to be stating a fact necessarily known to himself. We refer on this point to Chitty on Pleading (7th Ed.) 405.

It has been objected that the declaration does not shew that the plaintiff did after all give any credit to the Lewines.

It is not so distinctly averred certainly as it should have been, but it does sufficiently appear, we think, on the face of the whole declaration, that the plaintiff did give credit to them, for he avers that though the credit had elapsed, his goods are yet unpaid for. We are of opinion that the plaintiff should have judgment on the demurrer.

Judgment for plaintiff on demurrer.

WATSON v. JONES.

(Supreme Court of Florida, 1899. 41 Fla. 241, 25 South. 678.)

Error to circuit court, Escambia county; William D. Barnes, Judge.

Action by Allen R. Jones against Thomas C. Watson. There was a judgment for plaintiff, and defendant brings error. Reversed.

On February 10, 1894, defendant in error began an action on the case for deceit against plaintiff in error in the circuit court of Escambia county. The seventh or additional count added to the declaration as an amendment by leave of court alleges: "And because, to wit, on the 18th day of August, 1885, the defendant, then and there being the agent of one John D. Gray, and for the benefit and advantage of him, the said defendant, as agent of John D. Gray, craftily

[83] Brady v. Finn, 162 Mass. 260, 38 N. E. 506 (1894); Eibel v. Von Fell, 63 N. J. Law, 3, 42 Atl. 754 (1899: affirmed without opinion in 64 N. J. Law, 364, 48 Atl. 1117 [1900]) semble; Steip v. Seguine, 66 N. J. Law, 370, 49 Atl. 715 (1901) semble. Accord. See, further, 20 Cyc. 100, 101; 8 Pl. & Pr. 897.

The intent to deceive must be alleged. Holst v. Stewart, 154 Mass. 445, 28 N. E. 574 (1891); Evertson v. Miles, 6 Johns. (N. Y.) 138 (1810); Addington v. Allen, 11 Wend. (N. Y.) 375, 386, 414 (1833); Bartholomew v. Bentley, 15 Ohio, 659, 45 Am. Dec. 596 (1846).

and fraudulently procured and induced the plaintiff to make a loan of two thousand dollars to said John D. Gray on a mortgage upon certain real estate, which real estate the said defendant falsely and fraudulently represented to be free of incumbrances, whereas, as defendant well knew or ought to have known, the said real estate was subject to the prior lien of a judgment of this honorable court, of which plaintiff was ignorant, and which would have prevented plaintiff from making said loan had he had knowledge of it, and the said defendant concealed and continued to conceal the same, and the plaintiff remained in ignorance of it until after the foreclosing of the said mortgage, to wit, on the 24th day of November, 1891, and by reason of the said judgment lien plaintiff realized from the said security upon the foreclosure thereof one thousand and fifteen and $^{94}/_{100}$ dollars, less than amount to which he was entitled under the provisions of the decree of foreclosure, whereby the said one thousand and fifteen and $^{94}/_{100}$ dollars has been lost to the plaintiff."

The defendant moved to strike this count, because—First, it states two causes of action; second, it is double; third, the defendant cannot properly set forth his defenses thereto as framed. Defendant also filed a special demurrer to this count, the grounds thereof being the same as the motion to strike. The motion and demurrer being overruled, defendant filed two pleas, as follows: "(1) That he is not guilty; (2) that said count is based on transaction connected with the loan by plaintiff to J. D. Gray of $2,000 on the 19th day of August, 1885, and was completed on said date, at which time the alleged causes of action, if any there were, accrued to plaintiff, and this was more than three years before the institution of this suit." Plaintiff replied to the second plea "that, by reason of the matters and things stated in the seventh count of the declaration, he did not discover the existence of said judgment until within three years before the institution of this suit." The defendant demurred to this replication as being "bad in law and substance, and insufficient answer to said plea." The demurrer being overruled, defendant joined issue on the replication, plaintiff joined issue on defendant's plea of not guilty, and the parties proceeded to trial, which resulted in verdict and judgment for plaintiff in the sum of $1,273.51 and costs. Defendant's motion for a new trial being refused, he sued out the present writ of error from the judgment rendered against him. * * *

CARTER, J.[84] (after stating the facts). I. The rulings upon the special demurrer, the motion to strike, and the demurrer to the replication to the second plea, constitute the basis of the first three assignments of error. We shall consider them all together; for, in disposing of the demurrer and motion, we incidentally determine the sufficiency of the replication to the plea. The demurrer and motion pre-

[84] Statement of facts abridged and part of opinion omitted.

sent the same identical question, the pleader being uncertain whether his objection ought to be taken by special demurrer or by motion. His objection to the declaration relates to the use of the words, "well knew or ought to have known," in the allegation of the scienter. He does not contend that this form of allegation is bad because in the alternative, nor that it renders the declaration uncertain or insufficient. He expressly admits that either form, "knew" or "ought to have known," states an actionable knowledge of falseness; and he confines himself to the argument that defenses may be interposed to a count alleging that he "ought to have known" different from those admissible to a count alleging that he "knew" of the existence of the judgment lien at the time he made the alleged representation, and that he was therefore embarrassed in preparing his defense to a count alleging that he "knew or ought to have known." He argues that, under section 1294, Rev. St., prescribing a limitation of three years in actions "for relief on the ground of fraud, the cause of action in such case is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud," in an action for deceit, in which it is charged that defendant "knew" his representation to be false, the cause of action accrues from the "discovery by the aggrieved party of the facts constituting the fraud," while in a similar action, in which it is charged that defendant "ought to have known" the falsity of his representations, the cause of action accrues from the time plaintiff acted upon the false representations, without reference to the time he discovered the facts constituting the fraud. From these premises he concludes that the count, being framed upon the theory that defendant "knew," as well as upon the theory that he "ought to have known," that his representation was false, was bad for duplicity, and framed so as to embarrass him in pleading the statute of limitations as a defense.

The defendant in error contends: That, in actions for deceit, it is only necessary to allege the scienter generally, i. e. that defendant "knew" his representation to be false. That, under this general allegation, it may be proved that the representation was made either—First, with actual knowledge of its falsity; second, without knowledge either of its truth or falsity; or, third, under circumstances in which the person making it ought to have known, if he did not know, of its falsity. That the allegation in this declaration that "defendant well knew, or ought to have known," that his representations were false, does not charge different causes of action, as to which different defenses may be interposed, but, at most, indulges in a possible ambiguity of intimation as to the character of evidence intended to be introduced to prove the scienter, and that if the words, "ought to have known," had been omitted from the count, the count would still have been provable by evidence that defendant "ought to have known." He insists that we should either reject those words as surplusage, or

hold that the pleading be construed most strongly against him, thereby confining him to proof that defendant "ought to have known." * * *

The action, being for deceit, is necessarily founded in fraud, and, in order to make out a case of fraud, as distinguished from inadvertence, mistake, negligence, accident, and the like, it is necessary to allege and prove the scienter—the knowledge of defendant that his representations were false.[85] Binnard v. Spring, 42 Barb. (N. Y.) 470; Holmes v. Clark, 10 Iowa, 423. This is generally held to be the rule both in England and America, and the distinction between fraud and warranty—between deceit and honest mistake—should not be lost sight of, nor should the action for deceit be confounded with other actions at law or in equity, in which no proof of scienter is required. The courts are not entirely harmonious as to the quantity and character of proof necessary to sustain the allegation of scienter in cases of this character. * * * The question was considered by this court in Wheeler v. Baars, 33 Fla. 696, 15 South. 584, and the defendant in error relies upon the decision in that case in support of the position assumed by him in this one. It is there said that the scienter may be proved by showing—First, actual knowledge of the falsity of the representation by defendant; second, that defendant made the statement as of his own knowledge, or in such absolute, unqualified, and positive terms as to imply his personal knowledge of the fact, when in truth defendant had no knowledge whether the statement was true or false; or, third, that the party's special situation or means of knowledge were such as to make it his duty to know as to the truth or falsity of the representation. Under each phase, the proof must show that the statement was in fact false, and, in addition, under the first, that defendant had actual knowledge that it was false; under the second, that defendant made the statement as of his own knowledge, when in fact he had no knowledge whether it was true or false, which seems to bear a close resemblance to the English rule—"without belief in its truth, or recklessly careless wheth-

[85] Clark v. Lumber Co., 86 Ala. 220, 5 South. 560 (1888); Bedell v. Stevens, 28 N. H. 118, 125 (1853); Mahurin v. Harding, 28 N. H. 128, 59 Am. Dec. 401 (1853) semble; Bayard v. Malcolm, 2 Johns. (N. Y.) 550, 3 Am. Dec. 450 (1807) semble; Griswold v. Gebbie, 126 Pa. 353, 363, 17 Atl. 673, 12 Am. St. Rep. 878 (1889) semble; Wilson v. Talheimer, 20 Pa. Co. Ct. 203 (1897) semble. Accord.

An allegation that representation was fraudulent is considered as alleging that defendant knew it was false. Pryor v. McNairy, 1 Stew. (Ala.) 150 (1827); Farwell v. Metcalf, 61 Ill. 372 (1871); Forsyth v. Vehmeyer, 176 Ill. 359, 365, 52 N. E. 55 (1898); Beebe v. Knapp, 28 Mich. 53, 58 (1873); Eibel v. Von Fell, 63 N. J. Law, 3, 42 Atl. 754 (1899: affirmed without opinion in 64 N. J. Law, 364, 48 Atl. 1117 [1900]).

If the false representations alleged are seller's talk then the declaration must allege that the defendant fraudulently induced the plaintiff to make no investigation of the facts. Williams v. McFadden, 23 Fla. 143, 1 South. 618, 11 Am. St. Rep. 345 (1887); Parker v. Moulton, 114 Mass. 99, 19 Am. Rep. 315 (1873).

er it be true or false"; and, under the third, that defendant's special situation or means of knowledge were such as made it his duty to know as to the truth or falsity of the representation.

From this statement it is quite evident that proof sufficient to sustain the third phase tends very strongly to sustain the idea that the defendant had actual knowledge of the falsity of his statement; for when it is shown that the statement was material and false, and that the defendant's situation or means of knowledge were such as to make it incumbent upon him as a matter of duty to know whether the statement was true or false, the conclusion is almost irresistible that he did know that which his duty required him to know. For this reason the law conclusively presumes, from the existence of these facts, that defendant had actual knowledge of the falsity of his statement; or, more properly speaking, proof of these facts is sufficient to sustain a charge of actual knowledge, dispensing with further proof upon that subject, and admitting no proof to rebut the fact of actual knowledge, but only proof to rebut the existence of the facts from which such actual knowledge is inferred. We are therefore of opinion that proof of scienter in the third phase does not give another or different right or ground of action from that given by proof under the first phase, but that it simply establishes the same ultimate fact, viz. knowledge, by a different class of evidence, and consequently that an allegation that defendant "knew" his representation to be false is provable by evidence embraced in the third phase. In other words, an averment that defendant's situation or means of knowledge were such as made it his duty to know whether his statement was true or false, and an averment that defendant well knew his statements to be untrue, are but different methods of stating the same ultimate fact, viz. knowledge. McBeth v. Craddock, 28 Mo. App. 380; De Lay v. Carney Bros., 100 Iowa, 687, 69 N. W. 1053.

Without committing ourselves to the proposition that the words, "ought to have known," are in pleading a sufficient allegation that the defendant's special situation or means of knowledge were such as to make it his duty to know as to the truth or falsity of his representation, but treating them as such, because both parties agree that they are, we think that allegation in this declaration is merely an alternative, cumulative, and superfluous statement of the same ultimate fact, viz. knowledge, admitting of no other or different defense or evidence than the allegation which it follows, that "defendant well knew," and that its presence in the declaration did not, therefore, render the pleading bad for duplicity, or so framed as to embarrass the defendant in preparing his defense. A case made out by proof that defendant fraudulently made an untrue material statement, where his special situation or means of knowledge made it his duty to know whether that statement was true or false, presents a pure case of fraud and deceit, as much so as if defendant actually knew his statement to be false. In either case, the action is one "for relief on the

ground of fraud," and the cause of action accrues from the "discovery by the aggrieved party of the facts constituting the fraud." These conclusions sustain the rulings of the court below denying the motion to strike, and overruling the special demurrer to the declaration, embraced in the first and second assignments of error, as well as the ruling upon the demurrer to the plaintiff's replication to defendant's second plea, embraced in the third assignment of error. * * *

The judgment of the circuit court is reversed, and a new trial granted.[86]

BELMONT BANK OF ST. CLAIRSVILLE v. BEEBE.

(Supreme Court of Ohio, 1834. 6 Ohio, 497.)

This cause was adjourned from the county of Belmont.

Judge LANE[87] stated the case and delivered the opinion of the court:

This case stands before the court on a demurrer to the declaration. The plaintiffs declare, in a plea of trespass on the case, "that on November 25, 1830, at the county aforesaid, a person, to the plaintiffs unknown, made application and requested plaintiffs to loan him one thousand dollars for sixty days; that said person so unknown, referred the plaintiffs to the defendant, concerning his person, name, character, and standing; that said defendant, so referred to, in consideration that said plaintiffs would loan the said person the sum of one thousand dollars, warranted him, so unknown, and so applying, to be a reputable and respectable man of Tuscarawas county, of the name of Adam Riggle, and thereby induced plaintiffs to loan him one thousand dollars for sixty days. The plaintiffs, confiding in these representations, loaned the money; whereas, in fact, said person so unknown, and so warranted to be a reputable and respectable man of Tuscarawas county, by the name of Adam Riggle, was not a man of the name of Adam Riggle, of Tuscarawas county; by means of which defendant, falsely and fraudulently, deceived the plaintiffs on the loan aforesaid, and thereby said sum of money became wholly lost, and plaintiffs have been subjected to great expense in endeavoring to discover the name and residence of said person, and in recovering the money to their damage, one thousand eight hundred dollars. * * *

To make a good declaration in case for fraud, it is necessary to show that he made the affirmation fraudulently with the intention to deceive, or knowing the contrary to be the truth. No such charac-

[86] Knowledge of falsity need not be alleged if it is alleged that the defendant made the statement as of his own knowledge when he knew he had none. Litchfield v. Hutchinson, 117 Mass. 195 (1875). The same is true where it appears in the declaration that the defendant should have known the fact. Barnes v. Railway, 54 Fed. 87, 4 C. C. A. 199 (1893: Colorado, a code state, law).

[87] Part of the opinion omitted.

ter is attached to them by the pleader, except near the close, where he states that, by means of the premises, the said plaintiff [defendant?] falsely and fraudulently deceived the defendant [plaintiff?]. This seems rather an inference of the plaintiff than a direct averment of the fact. Such an averment was held good after verdict in New York. 11 Johns. 550. But it seems to have been there sustained only because objection was taken so late.

But in this statement of the cause of action, it is not shown how any injury arose from the act of the defendant. He is said to have warranted the person to be a respectable and reputable man of Tuscarawas county, of the name of Adam Riggle, whereas he was not a man of Tuscarawas county by the name of Adam Riggle, by means of which he deceived the plaintiff, and the debt was lost. He does not show how it was lost. If it was John Riggle instead of Adam, or if it were Adam Riggle of Belmont county, the representation would not be true, yet no injury would necessarily follow.

It is not shown that the person was not Adam Riggle, or that there was no such man. It seems to be indifferent to the plaintiff; whether the representation was true or not, the inference must follow the premises, the injury must be shown to arise from the representation, or the pleading is ill.[88]

Demurrer sustained.

SECTION 3.—DEFENSES

THE GENERAL ISSUE IN CASE.

(3 Chitty, Pleading [13th Am. Ed.] p. *1030.)

In the King's Bench.

C. D. ats. A. B. } ——— Term, ——— Will. 4. And the said defendant, by E. F. his attorney, comes and defends the wrong and injury, when, &c. and says, that he is not guilty of the said supposed grievances above laid to his charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against him. And of this he the said defendant puts himself upon the country, &c.

PLOWMAN et al v. FOSTER.

(Supreme Court of Tennessee, 1868. 6 Coldw. 52.)

At the May Term, 1867, this cause was submitted to a jury, who found for the plaintiff, from which the defendant appealed to this Court. Judge M. M. Brien, Sr., presiding.

[88] Northwestern Co. v. Breautigam, 69 N. J. Law, 89, 54 Atl. 228 (1903) semble. Accord.

JAMES O. SHACKELFORD, J., delivered the opinion of the Court.

This is an action of trespass on the case, brought by the defendant in error, against the plaintiff in error, for obstructing an alley. The declaration is in the usual form, to which the plaintiff in error pleaded: First, the general issue of not guilty; second, the statute of limitation of two years. Issue was taken, and at the May Term, 1867, the cause was submitted to a jury, under the charge of the Court, which resulted in a verdict for defendant in error. A new trial was moved for, the motion overruled, and judgment rendered against the plaintiff in error; from which there was an appeal to this Court.

The principal error assigned arises upon the part of his Honor's charge, in which he instructed the jury that the plea of not guilty admitted the plaintiff's right of way to the alley in question, and that this plea only denied that the defendant had obstructed it, and not plaintiff's right of way; and under this state of the pleadings, the plaintiff need not deraign his title to the alley; that the jury would look to the proof, and see if the plaintiff [defendant?] had obstructed the way, or placed obstructions in it, and if so their verdict should be for the plaintiff, etc. The pleadings in this cause are under the common law procedure in force before the adoption of the Code. The general issue pleaded to this declaration, is a denial of the whole cause of action, and puts in issue every essential fact stated in the declaration, and the plaintiff is bound to prove his case. In this form of action, under the general issue, the defendant may give in evidence any matter which operates in discharge of the cause of action, and he is not bound to plead his defenses specially.

There is an essential difference between the actions of trespass and trespass on the case. The first is stricti juris, and matters in excuse or justification, must be pleaded specially. The other is founded in the justice and equity of the case; for, whatever would, in equity and conscience, according to existing circumstances, preclude the plaintiff from recovering, might, in an action on the case, be given in excuse, by the defendant, under the general issue; because the plaintiff must recover upon the justice and conscience of his case, and on that only: 1 Chitty's Pleadings, 491. The case referred to by the counsel for defendant in error, in 10 Humph. 110, was an action of trespass for taking property; and the Court properly held, the defendant could not justify under the plea of the general issue, but must plead specially his matters of defense. The case in 5 Mass. 385, went off on the construction of a statute of that State. Since the adoption of the revised rules of pleading in England, the principles of the common law have been changed upon this point. These rules are not in force in this State, and we must follow the common law system of pleading, which has been adopted in this case, under the provisions of the Act of February 14th, 1860, which is a part of our system of jurisprudence. We are, therefore, of opinion, the

Court erred in his instructions to the jury upon this point, and we are constrained to reverse the judgment. Other exceptions were taken to the charge and ruling of the Court, in which we think there is no material error.

The judgment will be reversed, a new trial awarded, and the cause remanded.[89]

ARCHAMBEAU v. NEW YORK & N. E. R. CO.

(Supreme Judicial Court of Massachusetts, 1898. 170 Mass. 272, 49 N. E. 435.)

Report from superior court, Worcester county.

Action by William A. Archambeau against the New York & New England Railroad Company. Verdict for defendant. Judgment on the verdict.

HOLMES, J. This is an action of tort for personal injuries sustained while the defendant's road was in the hands of receivers. It happened that the next day after the accident the receivers turned over the property to a new corporation, so that the case suggests a possible hardship. But, in the opinion of a majority of the court, the defendant cannot be made liable on that account for an act done by persons who were not its agents or servants, but were put in control of its property by an adverse act. Railroad Co. v. Davis, 23 Ind 553, 85 Am. Dec. 477; Turner v. Railroad Co., 74 Mo. 602; Railway Co. v. Stringfellow, 44 Ark. 322, 324, 51 Am. Rep. 598; Railway Co. v. Searle, 11 Colo. 1, 16 Pac. 328; Railroad Co. v. Hoechner, 14 C. C. A. 469, 67 Fed. 456; Metz v. Railroad Co., 58 N. Y. 61, 66, 17 Am. Rep. 201; Brockert v. Railway Co., 82 Iowa, 369, 47 N. W. 1026; Railway Co. v. Huffman, 83 Tex. 286, 18 S. W. 741; High, Rec. (3d Ed.) § 396; Beach, Rec. (2d Ed.) §§ 384, 726; 2 Elliott, R. R. § 581. The special grounds upon which it has been thought proper to charge a corporation, to the extent of property in its hands paid for out of income by the receiver, do not exist. Railroad Co. v. Davis, 62 Miss. 271; Railway Co. v. Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60; Id., 151 U. S. 81, 99, 14 Sup. Ct. 250, 38 L. Ed. 81. As the defense shows that the defendant did not do the acts complained of, it is admissible under a general denial. Railroad Co. v. Davis, 23 Ind. 553, 561, 85 Am. Dec. 477.

Judgment on the verdict.

[89] City v. McMurray, 76 Ill. 353 (1875); Fulton v. Merrill, 23 Ill. App. 599 (1887). Accord. Jessup v. Loucks, 55 Pa. 350 (1867) semble. Contra.

McNULTA v. LOCKRIDGE.

(Supreme Court of Illinois, 1891. 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362.)

Error to appellate court, third district.

On the 15th day of January, 1887, James Molohan and Mary E. Molohan, his wife, while attempting to cross the track of the Wabash, St. Louis & Pacific Railway in a sleigh, at a public crossing in Christian county, were struck by a locomotive engine and tender and killed. On the 13th day of July following, Lockridge, the defendant in error, as administrator of their respective estates, brought suits against the plaintiff in error, as receiver of the Wabash, St. Louis & Pacific Railway Company, for causing their deaths. The declarations in the two cases were alike except as to the name of the decedent; and by agreement of parties they were consolidated and tried as one case. The results of a jury trial were verdict and judgment for defendant in error, and against said receiver, for $6,000 damages, and the judgment was afterwards affirmed in the appellate court. The writ of error now in question brought the record to this court.

The declarations upon which the causes were tried each contained three counts, and the negligences alleged in the respective counts of each declaration were that the statutory signals were not given on approaching the crossing; that trees, shrubbery, etc., were permitted to remain on the right of way upon and about the crossing, which obstructed the view of persons traveling on the highway, and prevented the deceased from seeing the engine and tender in time to avoid them; and that the engine was driven at a high and reckless rate of speed. The declarations each also alleged "that on the 16th day of December, 1886, in a certain cause in equity, then pending in the circuit court of the United States for the southern district of Illinois, wherein the Central Trust Company of New York and others were complainants, and the Wabash, St. Louis & Pacific Railway Company et al. were defendants, one Thomas M. Cooley was by order of said court appointed receiver of the Wabash, St. Louis & Pacific Railway Company, and was then and there duly qualified as such receiver, and from thenceforward until the 1st day of April, A. D. 1887, had possession of, used, and operated said railway," etc. And each declaration concluded as follows: "And the plaintiff further avers that said Thomas M. Cooley afterwards, to-wit, on the 1st day of April, A. D. 1887, resigned his said office of receiver as aforesaid, and the said circuit court of the United States for the southern district of Illinois accepted the resignation of said Thomas M. Cooley as such receiver, and afterwards, to-wit, on the 1st day of April, A. D. 1887, the court last aforesaid, by an order entered in said cause aforesaid, appointed the defendant, John McNulta, receiver of said Wabash, St. Louis & Pacific Railway Company; that said defendant, John

McNulta, then and there duly qualified as such receiver, and he thenceforward has been in possession of, using, and operating said railway as such receiver," etc. The only pleas interposed by the defendant were pleas of not guilty. * * *

The court, at the instance of the defendant below, gave to the jury some 13 instructions; and refused to give several others that were asked; and among those so refused was one which was as follows: "(4) The court instructs the jury that it is averred in plaintiff's declaration that at the time of the accident in question Thomas M. Cooley was operating the railway as receiver and that the defendant was subsequently appointed the successor of said Cooley as such receiver, and the court instructs you that to entitle the plaintiff to recover this averment must be proved, and, unless the plaintiff has made such proof, the jury should find for the defendant, without regard to all other questions in the case." * * *

BAKER, J.[90] * * * Second. It is conceded by plaintiff in error that when the general issue alone is pleaded it does not put in issue either the character or capacity in which the defendant is sued. It is claimed, however, that in the case at bar the general issue admitted that McNulta was receiver at the time he was sued, and that only. We think this is placing too restricted a signification upon the implied concessions made by the pleadings. Suppose that a declaration alleged that A., since deceased, made his last will and testament, by which he appointed B. his executor, and that B. qualified and acted as such executor; that B. afterwards resigned his office of executor, and was discharged; and that C. was thereupon appointed administrator de bonis non cum testamento annexo, and duly qualified as such administrator, and became and was the successor in office to B.; and further suppose the suit was brought against C., as such administrator, and for the purpose of enforcing a legal liability assumed by or imposed upon C. in his capacity of executor, and the declaration alleged in apt language the facts above stated, and also the particular cause of action sought to be enforced,—in such state of the case, the general issue, and no other plea, being filed, there would be an implied admission not only that C. was administrator at the time of suit brought, but also implied admissions that B. was executor at the time when, etc., and that C. was successor in office to B., as averred in the declaration. Again, suppose suit was brought against the Illinois Central Railroad Company, and the declaration averred that at the time when, etc., said company was operating the Illinois Central Railroad from Chicago to Cairo, that at, etc., on, etc., aforesaid, the plaintiff was a passenger on said railroad, and that by means of certain specified negligences on the part of the servants of the railroad company operating the train upon which he was a passenger he, the plaintiff, received certain personal injuries, the plea of not guilty, and that only,

[90] Statement of facts abridged and part of opinion omitted.

being interposed, it could not properly be claimed that the suit of the plaintiff must fail for the reason that he did not introduce at the trial a witness who could testify from his personal knowledge that at the time when, etc., the corporation sued was operating the railroad, and that the conductor, engineer, fireman, and others operating the train had been employed by the company sued, and were in fact its servants, and not the servants of some receiver or other person or corporation. In the case last stated it would be impliedly conceded by the pleadings, not only that the Illinois Central Railroad Company was a corporation, but also that at the time of the alleged injury it was operating the particular line of railroad mentioned in the declaration, and that the operatives in charge of the train being run on said road were its servants and employés. The two supposed cases above stated, taken together, present in substance the case that appears in the record now before us. The admission upon the pleadings is of the character and capacity in which the defendant is sued. That character and capacity includes not only the bare fact that at the time that suit was instituted plaintiff in error was receiver, but the further facts alleged in the declarations that at the time when, etc., Cooley was receiver of the Wabash, St. Louis & Pacific Railway Company by appointment of court made in the cause in equity designated in the declarations, and was in possession of and operating the line of railway mentioned therein as such receiver; and that the employés operating the trains on said road were the servants of said Cooley as such receiver; and that on April 1, 1887, said Cooley resigned his office of receiver, and the court accepted such resignation, and on the same day, and in the same cause, appointed McNulta as such receiver, and as successor in office to Cooley; and that he, McNulta, then and there qualified and entered upon his duties as such receiver. In line with what we have thus stated on this point is the case of McNulta v. Ensch, 134 Ill. 46, 24 N. E. 631. The views we have expressed sufficiently indicate our opinion that the trial court committed no error in refusing to instruct the jury as requested by the plaintiff in error. * * *

Judgment affirmed.[91]

[91] Penn. Co. v. Chapman, 220 Ill. 428, 77 N. E. 248 (1906); Brunhild v. Traction Co., 239 Ill. 621, 88 N. E. 199 (1909). Accord. Cincinnati Ry. v. Goodson, 101 Ill. App. 123 (1901). Contra.

It is clear that generally the defendant may under the general issue prove that he did not do the act alleged to be wrongful. McPherson v. Daniels, 10 B. & C. 263 (1829); Wetherell v. Railway Co., 104 Ill. App. 357, 362 (1902).

GREENWALT et al. v. HORNER et al.

(Supreme Court of Pennsylvania, 1820. 6 Serg. & R. 71.)

From the record of this case, which came before the Court, on a writ of error to Dauphin county, it appeared to be a special action on the case brought by the plaintiffs in error, Jacob Greenwalt, Philip Leebrich, and Jacob Andrew, against John Horner, Jacob Keller, and David Keller, the defendants in error, for disturbing them in a right of way over the lands of one of the defendants. The plea was, not guilty. The facts of the case were as follows:

On the petition of Jacob Greenwalt, Philip Leebrich, and Samuel Eshelman, to the Court of Quarter Sessions of February, 1808, for a public road, from Killough Run, to a certain tract of land which they had purchased, viewers were appointed, who reported in favour of a private road, which they designated by courses and distances. At August Session, 1808, a petition was presented by the administrators of Peter Ebersole, deceased, over whose land the contemplated road was to pass, in consequence of which, reviewers were appointed, who reported, that the road, marked out, would be highly injurious to private property, and reported one by different courses and distances. This report was, after argument, set aside by the Court, and re-reviewers appointed, by whom a private road was reported over the lands of the heirs of Peter Ebersole, on nearly the same ground as had been returned by the first viewers. This report was confirmed, and an application was afterwards made by the administrators of Ebersole, for the appointment of viewers, to appraise the damages sustained by the owners of property in consequence of opening the road. Viewers were accordingly appointed, who made the following report:

"That the petitioners for the said road, are to hang swinging gates on the said road at each end, at their expense, and in case any water works should be erected on Killough Run, and the said road be any obstruction unto mills of any kind of a public nature, the said petitioners are to remove the said road to the west, and the heirs of the said deceased, are to give them the privilege of ground for the said road; and further we do report, that the petitioners for the said road, are to pay the sum of forty eight dollars damages for the said ground."

This report was confirmed by the Court, and the damages paid by the petitioners.

When the cause came on for trial, after the plaintiffs had gone through the evidence in support of their case, the defendants offered to prove, that when the viewers convened on the premises, for the purpose of estimating the damages, in the presence of the plaintiffs and the owners of the land, it was mentioned by the jury, that they would appraise the road without taking into view the mill seat, provided the parties would agree to move the road, in case any mill works

should be erected on the ground over which it was laid out; that the plaintiffs agreed to this proposition, and consented to the removal of the road, whenever any mill works should be erected, provided the owners of the land would give them other ground for the road; that when the owners complained of the contemplated road spoiling the mill seat, and one of them observed, that he could build an oil mill, a fulling mill, or some other mill works on it, Leebrich said in the presence of Greenwalt, if they could make a mill there, he would move the road, and be no hindrance to the mill; that he then said, they would move the road to the west, if mills should be built; that the jury then appraised the damages, only for the ground taken for the road, at forty-eight dollars, and did not consider the value of the mill seat; that the value of a mill seat there, at that period, was from five hundred to nine hundred dollars; that the report, estimating the damages, was returned to the Court where the plaintiffs had an attorney, who superintended their interests, and conducted the proceedings in procuring the road, and that no exceptions were made to the report, but that it was agreed to, and the forty-eight dollars damages paid by the plaintiffs; that the land of John Horner, one of the defendants, consisting of sixteen acres, over which the road passed, would not be worth twenty dollars an acre without a mill, and that he gave eighty dollars an acre for it; that he built a good two story chopping and clover seed mill; and that before he began the works, or to approach the road, he gave the plaintiffs liberty to make a new road west of the one laid out, and showed them the ground on which to make it; that at the time the damages were appraised, the said sixteen acres belonged to the heirs of Peter Ebersole, deceased, whose son took them at an appraisement, and sold them in the year 1814, to George Horner, who was at that time married to one of Ebersole's daughters, and that he in the spring of 1816, sold them to John Horner. The counsel for the plaintiffs, objected to the admission of evidence in support of these facts, but the Court overruled the objection, and an exception was taken to their opinion. * * *

DUNCAN, J.,[92] delivered the opinion of the Court. * * *

On this exception, depend the whole merits. It is contended, that all the evidence thus offered and admitted, was impertinent to the issue. First, for that if it could be received on any plea, it could not on the general issue. This objection is misconceived, for there is an essential difference between actions of trespass and on the case; the former are stricti juris, and therefore, a former recovery, release, or satisfaction, cannot be given in evidence on the general issue, but must be pleaded; but the latter is founded on the mere justice and conscience of the plaintiff's case, and is in the nature of a bill in equity, and in effect is so, and therefore, a former recovery, release, or satisfaction, need not be pleaded, but may be given in evidence;

[92] Statement of facts abridged and part of opinion omitted.

for whatever will in equity and conscience, according to existing circumstances, preclude the plaintiff from recovering, may in case be given in evidence by the defendant, because the plaintiff must recover on the justice and conscience of his case, and on that only. Barber v. Dixon, 1 Wils. 45; Bird v. Randall, 3 Burr. 1353; 1 Wm. Bl. 388. On the general issue the plaintiff is put to the proof of his whole case, and the defendant may give in evidence, any justification, or excuse of it.[93] Birch v. Wilson, 2 Mod. 276; Bradley v. Wyndham, 1 Wils. 44; Brown v. Best, 1 Wils. 175. This is the general law. The cases of defamation are an exception to this rule; there, the truth of the words must be pleaded,[94] but the cause of speaking the words, or publication in writing, may be given in evidence, warranting the act; as the character of a servant given by his former master; words spoken by counsel pertinent to the matter in issue, and a variety of other matters, which go to bar the plaintiff's recovery.[95] But this very point has been decided; for in Newton v. Creswick, 3 Mod. 166, in case for obstructing ancient lights, on not guilty, the defendant was permitted to give evidence of a custom to build ancient foundations to any height. If the agreement, coupled with the report of the viewers of damages, was a valid one, then at least it amounted to a license on a given event, which event was offered to be proved; the use of the road for mills. Now though a license must be pleaded in trespass, yet it may be given in evidence in case. 2 Mod. 6, 7; 1 Chitty's Plead. 478. And in this State, the reception of evidence on the general issue, if not more liberal in our Courts, is not stricter than in the Courts of Westminster Hall. Nothing could form a

[93] Dalston v. Janson, 5 Mod. 90 (1696: accident) semble; Slater v. Swan, 2 Strange, 871 (1731: defense of property); Barker v. Dixon, 1 Wilson, 45 (1743: custom) semble; Brown v. Best, 1 Wilson, 174 (1747: prescription) semble; Bird v. Randall, 3 Burrows, 1345, 1354 (1762: accord and satisfaction) semble; King v. Waring, 5 Espinasse, 13 (1803: consent) semble; Jones v. Buzzard, 2 Ark. 415, 442 (1839: legal process); Rust v. Flowers, 1 Har. (Del.) 475 (1835: consent); Wiggins Co. v. Blakeman, 54 Ill. 201 (1870: contributory negligence—possibly denial in Illinois: fellow servant—but see Chicago Ry. v. Leach, 208 Ill. 198, 70 N. E. 222, 100 Am. St. Rep. 216 [1904], semble contra); City of Chicago v. Babcock, 143 Ill. 358, 365, 32 N. E. 271 (1892: accord and satisfaction) semble; Kapischki v. Koch, 180 Ill. 44, 54 N. E. 179 (1899: former recovery); Papke v. Hammond, 192 Ill. 631, 643, 61 N. E. 910 (1901: release); Hills v. Railroad Co., 18 N. H. 179 (1846: consent); Hall v. Snowhill, 14 N. J. Law, 551 (1835: legal process); Gilchrist v. Bale, 8 Watts (Pa.) 355, 34 Am. Dec. 469 (1839: former recovery); Whitney v. Clarendon, 18 Vt. 252, 46 Am. Dec. 150 (1846: former recovery); Kidder v. Jennison, 21 Vt. 108 (1849: highway officers); Jerome v. Smith, 48 Vt. 230, 21 Am. Rep. 125 (1876: defense of property). Accord.

[94] Underwood v. Sparks, 2 Strange, 1200 (1744). Accord. Seldom or never doubted since. See, for many citations, 13 Pl. & Pr. 78; 25 Cyc. 475, 476.

[95] Tabart v. Tipper, 1 Camp. 350 (1808); Hagan v. Hendry, 18 Md. 177, 191 (1861); Fresh v. Cutter, 73 Md. 87, 20 Atl. 774, 10 L. R. A. 67, 25 Am. St. Rep. 575 (1890); Bradley v. Heath, 12 Pick. (Mass.) 163, 22 Am. Dec. 418 (1831: law now contra by statute adopting Code rule as to pleading all defenses); Carpenter v. Bailey, 53 N. H. 590 (1873) semble; O'Donaghue v. McGovern, 23 Wend. (N. Y.) 26, 32 (1840) semble; Hackett v. Brown, 2 Heisk. (Tenn.) 272 (1871) semble. Accord.

stronger equity, than the defence set up by the defendants. The plaintiffs produced the report of the viewers of damages and a receipt for the payment; they made this report of the viewers a part of their own case,—indeed it was a part of their own title, without which they could not recover. The evidence was proper to show, and to show by the viewers, that this report, was founded on the agreement of the petitioners, was made on the ground at the time of the view, part of the res acta. But, it is objected, that all the parties were not present, and that the agreement of one, could not bind the others. The answer is obvious: if this action is supportable at all, it must be, because the plaintiffs have a joint interest, and have received a joint injury; two of the plaintiffs at least came into the agreement, Leebrich and Greenwalt, and all of them ratified it; accepted the report of the road on the terms thus agreed on. Whatever in equity takes away the right, takes away the remedy, and under the general issue, may be given in evidence. The evidence was properly received. * * *

Judgment affirmed.

HILL v. TOWN OF NEW HAVEN.

(Supreme Court of Vermont, 1865. 37 Vt. 501, 88 Am. Dec. 613.)

Action on the case to recover damages for the death of the plaintiff's intestate alleged to have been caused by the insufficiency of a certain highway in the town of New Haven. Plea, the general issue, and trial by jury, June Term, 1864, Pierpont, J., presiding. * * *

It appeared, and was not disputed, that the plaintiff's intestate, George H. Eager, while on his way from Bristol to Middlebury village, where he resided, driving a pair of horses attached to a wagon, on a highway in the town of New Haven, went with his team off from the highway into the New Haven river, and was drowned; that he left a wife and two children, one of the children having since deceased; that the plaintiff is the administrator on his estate, and that due and reasonable notice was given by the plaintiff to the defendant that the claim for damages embraced in this action would be made. * * *

After verdict and before judgment, the defendant moved in arrest of judgment for the insufficiency of the plaintiff's declaration. It was claimed that the declaration should have specifically alleged that the plaintiff's intestate died within two years before this suit was commenced, whereas it only alleged the time when the injury was received and when he died, which was within two years before the commencement of the action. This motion was overruled. * * *

POLAND, C. J.[96] * * * The motion in arrest was properly overruled.

[96] Statement of facts abridged and part of opinion omitted.

The statute giving an action in cases like the present, to the representative of the person whose death has been caused by the wrongful act, neglect or default of another, provides that such action shall be commenced within two years after the decease of such person.

The declaration in this case states the time when the injury was received and the death of the plaintiff's intestate occurred, and this time is within two years before the commencement of the action, but it is not specifically alleged that it was within two years.

The argument of the defendant is, that the plaintiff in his proof would not be bound by the day alleged in the declaration, and that he might prove it to have been more than two years before the commencement of the suit, and thus entitle himself to recover contrary to the provisions of the statute.

If this provision of the statute is to be regarded the same as the ordinary statute of limitations, which must be specially pleaded in order to entitle a party to avail himself of it,[97] there would be considerable force in the objection. But we do not regard it as having precisely that character, but as an absolute bar not removable by any of the ordinary exceptions or answers to the statute of limitations. So if upon the declaration it appeared that the death happened more than two years before the commencement of the action, the declaration would be bad upon demurrer, and the plaintiff could not answer that he was not bound by the day, and might on trial prove it to be within two years, nor would the defendant in such case be compelled to plead the statute. And so if it be alleged within two years, and on trial is proved to be more than two years before the commencement of the action, the defendant would be entitled to a verdict for that reason.

Whether this declaration would have been sufficient on demurrer, we are not called upon to decide, but after verdict we have no hesitation in upholding it, both upon the ground of the allegation of time being sufficient, and also that it was a necessary fact to be proved on the trial in order to enable the plaintiff to recover, and after verdict it would be presumed to have been proved, if the time had not been alleged at all. * * *

The judgment is affirmed, and the petition for a new trial dismissed with costs.[98]

[97] Dyster v. Battye, 3 B. & Al. 448, 452 (1820) semble; Huston v. McPherson, 8 Blackf. (Ind.) 562 (1847). Accord.

[98] Wall v. Railway, 200 Ill. 66, 65 N. E. 632 (1902) semble. Contra.

BROWN v. CONNELLY.

(Supreme Court of Indiana, 1840. 5 Blackf. 390.)

Appeal from the Montgomery Circuit Court.

BLACKFORD, J.[1] Connelly sued Brown for malicious prosecution. The declaration states that the defendant, by falsely and maliciously making an affidavit that the plaintiff had feloniously stolen his cow, had caused the plaintiff to be arrested under a justice's warrant, and to be imprisoned until, &c. There are two special pleas relying on probable cause. The first merely states, in general terms, that the defendant had a probable cause for the prosecution. The second sets out the facts as follows: That the plaintiff drove away the defendant's cow from Tippecanoe county to Putnam county, without the defendant's knowledge or consent, and sold her to one Bridges; and that, afterwards, when the defendant asked the plaintiff if he had sold any cows to Bridges, the plaintiff said he had not. The general issue was also pleaded. The first plea was specially demurred to, because the facts are not stated, and the demurrer was correctly sustained.[2] The second plea was also specially demurred to on the ground that it amounted to the general issue; and the Court sustained the demurrer. The cause was tried on the general issue, and a verdict given for the plaintiff. Motion for a new trial overruled, and judgment on the verdict.

The second plea is not bad for the cause assigned. Whether any given facts amount to a probable cause for the prosecution, is a question of law. Johnstone v. Sutton, 1 T. R. 545; Blachford v. Dod, 2 Barn. & Adol. 179. And such facts may therefore be specially pleaded.[3] 1 Chitt. Pl. 528; Morris v. Corson, 7 Cow. (N. Y.) 281. It is true, as the general issue was filed, under which probable cause may be proved, the plea in question was unnecessary,[4] and might have been struck out on motion. Cotton v. Brown, 3 Adol. & Ell. 312. But still it was not subject to a demurrer for the cause alleged. We think, however, that this plea is defective in substance, for not show-

[1] Part of the opinion omitted.

[2] Horton v. Smelser, 5 Blackf. (Ind.) 428 (1840); Legrand v. Page, 7 T. B. Mon. (Ky.) 401 (1828). Accord. See, also, 13 Pl. & Pr. 462.

Likewise in trespass for false imprisonment in pleading reasonable ground for suspecting plaintiff guilty of a crime, the facts must be stated. Mure v. Kaye, 4 Taun. 34 (1811); Wade v. Chaffee, 8 R. I. 224, 5 Am. Rep. 572 (1865).

[3] Birch v. Wilson, 2 Mod. 274 (1677); Green v. Pope, 1 Ld. Raym. 125 (1696) semble. Accord.

[4] Newton v. Creswick, 3 Mod. 165 (1630); White v. Fox, 1 Bibb (Ky.) 369, 4 Am. Dec. 643 (1809); Ross v. Neal, 7 T. B. Mon. (Ky.) 407 (1828); Folger v. Washburn, 137 Mass. 60 (1884). Accord. Fant v. McDaniel, 1 Brev. (S. C.) 173, 2 Am. Dec. 660 (1802). Contra.

That the prosecution terminated in favor of the present plaintiff is put in issue by not guilty. Cole v. Hanks, 3 T. B. Mon. (Ky.) 208 (1826); Lowe v. Wartman, 47 N. J. Law, 413, 1 Atl. 489 (1885).

ing a sufficient excuse for making the charge described in the declaration. * * *

PER CURIAM. The judgment is affirmed with one per cent. damages and costs.[5]

[5] Pain v. Rochester, Cro. Eliz. 871 (1602); Horton v. Smelser, 5 Blackf. (Ind.) 428 (1840) semble; Garrard v. Willet, 4 J. J. Marsh. (Ky.) 628 (1830) semble; Morris v. Corson, 7 Cow. (N. Y.) 281 (1827) semble. Accord. Newton v. Creswick, 3 Mod. 165 (1630). Contra.

Generally a plea in confession and avoidance argumentatively denying a necessary allegation is bad. Green v. Pope, 1 Ld. Raym. 125 (1696); McPherson v. Daniels, 10 B. & C. 263 (1829). Accord.

But in the early cases there was uncertainty. Lord Cromwell's Case, 4 Co. 14a (1581) semble; Shrewsbury v. Stanhope, Popham, 66 (1595).

And it seems that to-day even affirmative defenses, generally, cannot be pleaded in confession and avoidance. Wiggins Co. v. Blakeman, 54 Ill. 201 (1870). Accord. Templeman v. Case, 10 Mod. 24 (1712). Contra.

Yet there is some indication that privilege in defamation may be pleaded in confession and avoidance if the defendant so desires. Hagan v. Hendry, 18 Md. 177, 191 (1861) semble; Carpenter v. Bailey, 53 N. H. 590 (1873) semble.

CHAPTER IV

TROVER

SECTION 1.—SCOPE OF THE ACTION

SWIFT v. MOSELEY et al.

(Supreme Court of Vermont, 1838. 10 Vt. 208, 33 Am. Dec. 197.)

Trover, for two oxen, three cows and nine sheep. Plea—Not guilty. On the trial of the cause in the county court, it appeared in evidence, that, in the spring of 1835, the plaintiff leased a farm, lying in Bridport, (of which he was possessed in right of his wife,) together with the above mentioned cattle and sheep, to one Jirah Swift, for the term of one year; by the terms of said lease, the plaintiff and said Jirah Swift, were, at the end of the year, to divide the profits of the farm and the increase of the stock, equally between them, which stock was to remain upon the farm during the year, unless sold or taken off by the consent of the plaintiff and said Jirah Swift; that some time in the month of August, 1835, the said Jirah Swift sold said cattle and sheep to the defendants, without the consent of the plaintiff, and absconded, and that the defendants, immediately after making the purchase, drove the cattle and sheep away from the farm. The plaintiff introduced testimony tending to prove, that the defendants knew that Jirah Swift had no right to dispose of the cattle and sheep, and that they purchased them much under their value. Upon this evidence, the county court decided, that this action could not be sustained, as the plaintiff brought the suit previous to the termination of said lease, by the terms of which he had parted with his right of possession of the property in question, during its continuance, and rendered a judgment for the defendants, to which decision the plaintiff excepted.

REDFIELD, J. It seems to be well settled, that the plaintiff, in trespass de bonis asportatis, or trover, in order to maintain the action, must have had, at the time of the injury complained of, either the actual custody of the thing injured or taken, or a property in it, either general or special, with the right to immediate possession.[1] If he had

[1] Gordon v. Harper, 7 D. & E. 9 (1796); Bloxam v. Sanders, 4 B. & C. 941 (1825); Booker v. Jones, 55 Ala. 266, 274 (1876); Vincent v. Cornell, 13 Pick. (Mass.) 294, 23 Am. Dec. 683 (1832); Raymond v. Guttentag, 177 Mass. 562, 59 N. E. 446 (1901); Clark v. Draper, 19 N. H. 419 (1849); Andrews v.

the actual custody of the thing,[2] even wrongfully,[3] he may maintain the action against every one, whose right is not superior to his. Perhaps a mere servant could not be said to have any such custody.[4] His possession is that of the master. The general owner of a chattel may always maintain the action, unless he have parted with the possession, for a "definite term." [5] Ward v. Macauley, 4 T. R. 489. Lord Kenyon in that case intimates an opinion, that trover will lie, but in Gordon v. Harper, 7 T. R. 12, it is expressly held, that case is the only remedy for an injury done to the thing bailed, during the continuance of the bailment.

In the present case it is contended, that the act of the lessee or bailee, in selling to the defendants, did, ipso facto, determine his right, and revive the right of the plaintiff to immediate possession. If so, the plaintiff may maintain this action. It may be well to inquire what acts will determine a bailment of this character.

It is certain the act of a mere stranger will not operate to revive the plaintiff's right to immediate possession. Any misuse or abuse of the thing bailed, in the particular use for which the bailment was made, will not enable the general owner to maintain trespass or trover against the bailee. His only remedy is case. But if the thing be put

Shaw, 15 N. C. 70 (1833); Haines v. Cochran, 26 W. Va. 719, 723 (1885) semble. Accord. Longfellow v. Lewis, Fed. Cas. No. 8,487 (1878: Mass. law); Cooke v. Woodrow, Fed. Cas. No. 3,181 (1807: D. C. law). Contra.

[2] Rochester Co. v. Locke, 72 N. H. 22, 54 Atl. 705 (1903); Marcy v. Parker, 78 Vt. 73, 84, 62 Atl. 19 (1905). Accord.

[3] Basset v. Maynard, Cro. Eliz. 819 (1601) semble; Carter v. Bennett, 4 Fla. 283, 355 (1852) semble; Grubb v. Guilford, 4 Watts (Pa.) 223, 28 Am. Dec. 700 (1835). Accord. Kemp v. Thompson, 17 Ala. 9 (1849); Weil v. Ponder, 127 Ala. 296, 28 South. 656 (1900). Contra.

Accordingly jus tertii is no defense where the plaintiff was in possession and the defendant is unconnected with the jus tertii. Armory v. Delamirie, 1 Strange, 505 (1722); Webb v. Fox, 7 D. & E. 391 (1797); Skinner v. Pinney, 19 Fla. 42, 54, 45 Am. Rep. 1 (1882) semble; Coffin v. Anderson, 4 Blackf. (Ind.) 395, 410 (1837); Stevens v. Gordon, 87 Me. 564, 33 Atl. 27 (1895) semble; Harker v. Dement, 9 Gill (Md.) 7, 52 Am. Dec. 670 (1850); Stearns v. Vincent, 50 Mich. 209, 216, 15 N. W. 86, 45 Am. Rep. 37 (1883) semble; Prosser v. Woodward, 21 Wend. (N. Y.) 210 (1839) semble; Marcy v. Parker, 78 Vt. 73, 86, 62 Atl. 19 (1905). Accord. Sevier v. Holliday, 2 Ark. 512, 576 (1840) semble; Ribble v. Lawrence, 51 Mich. 569, 17 N. W. 60 (1883: where defendant acts peaceably and under claim of right); Williams v. Brown, 137 Mich. 569, 572, 100 N. W. 786 (1904) semble; Jones v. Sinclair, 2 N. H. 319, 9 Am. Dec. 75 (1820) semble; Glenn v. Garrison, 17 N. J. Law, 1 (1839); Schermerhorn v. Van Volkenburgh, 11 Johns. (N. Y.) 529 (1814: not clear); Hostler v. Skull, 1 N. C. 183, 1 Am. Dec. 583 (1801); Smoot v. Cook, 3 W. Va. 172, 100 Am. Dec. 741 (1869). Contra.

[4] Ludden v. Leavitt, 9 Mass. 104, 6 Am. Dec. 45 (1812); Stearns v. Vincent, 50 Mich. 209, 217, 15 N. W. 86, 45 Am. Rep. 37 (1883); Dillenback v. Jerome, 7 Cow. (N. Y.) 294 (1827). Accord.

[5] Right to possession is sufficient. Roberts v. Wyatt, 2 Taun. 268 (1810); Farrant v. Thompson, 5 B. & Al. 826 (1822); Moulton v. Witherell, 52 Me. 237 (1863); Hunt v. Holton, 13 Pick. (Mass.) 216 (1832); Trust Co. v. Hardwood Co., 74 Miss. 584, 594, 21 South. 396 (1896); Drake v. Redington, 9 N. H. 243 (1838); Smith v. James, 7 Cow. (N. Y.) 328 (1827); Jones v. Dugan, 1 McCord (S. C.) 428 (1821). Accord.

to a different use from that for which it was bailed, by the consent of the bailee, we think the bailor may maintain trespass or trover.

It has been long settled that if the bailee kill or destroy the thing bailed, trespass or trover will lie. Coke's In. a, 53. It was early held, too, that the interest of the tenant in standing trees was so far determined by their being severed from the freehold, that the landlord might maintain trespass.

In the case of Farrant v. Thompson, 5 Barn. & Ald. 826, found in the 7th Com. Law R. it was held that machinery, leased and by the lessee severed from the freehold, became instanter re-vested in the lessor, and he might maintain trover even during the continuance of the term. The case is expressly put by the court upon the ground, that the lessee, by his wrongful act, forfeits his right, and thus "puts an end to his qualified possession." If so in that case, much more in this, where the bailee sells the property. The same doctrine here decided is held in the case of Sanborn v. Colman, 6 N. H. 14, 23 Am. Dec. 703.

The judgment of the County Court is reversed, and a new trial granted.[6]

CLARK v. MALONEY.

(Superior Court of Delaware, 1840. 3 Har. 68.)

Action of trover to recover the value of ten white pine logs. The logs in question were found by plaintiff floating in the Delaware Bay after a great freshet, were taken up and moored with ropes in the mouth of Mispillion creek. They were afterwards in the possession of defendants, who refused to give them up, alleging that they had found them adrift and floating up the creek.

BAYARD, Chief Justice, charged the jury; The plaintiff must show first, that the logs were his property; and secondly, that they were converted by the defendants to their own use. In support of his right of property, the plaintiff relies upon the fact of his possession of the

[6] Loeschman v. Machin, 2 Starkie, 311 (1818); Ayer v. Bartlett, 9 Pick. (Mass.) 156 (1829) semble; United Co. v. Holt, 185 Mass. 97, 69 N. E. 1056 (1904); Johnston v. Whittemore, 27 Mich. 463, 468 (1873); Morse v. Crawford, 17 Vt. 499, 44 Am. Dec. 349 (1845); Turner v. Waldo, 40 Vt. 51 (1867: not clear); Harvey v. Epes, 12 Grat. (Va.) 153, 166 (1855). Accord.

It is commonly said that if one having a special interest in a chattel recovers for a conversion of it that bars a suit by the general owner to recover for the same wrong, and vice versa. Flewellen v. Rave, 1 Bulstr. 68 (1611) semble; Nichols v. Bastard, 2 C., M. & R. 659 (1835) semble; The Winkfield, (1902) P. 42, 61 (1901: Code) semble; St. Louis Ry. v. Biggs, 50 Ark. 169, 172, 175, 6 S. W. 724 (1887: Code) semble; Smith v. James, 7 Cow. (N. Y.) 328 (1827) semble; Hostler v. Skull, 1 N. C. 183, 1 Am. Dec. 583 (1801) semble. See, also, 2 Williams' Saunders' Rep. 47 l; Holmes, Common Law, 171. In Ribble v. Lawrence, 51 Mich. 569, 17 N. W. 60 (1883) it was said, though not decided, that the recovery by a bare possessor would not bar a suit by the owner.

logs. They were taken up by him, adrift in the Delaware Bay, and secured by a stake at the mouth of Mispillion creek. Possession is certainly prima facie evidence of property. It is called prima facie evidence because it may be rebutted by evidence of better title, but in the absence of better title it is as effective a support of title as the most conclusive evidence could be. It is for this reason, that the finder of a chattel, though he does not acquire an absolute property in it, yet has such a property, as will enable him to keep it against all but the rightful owner. The defence consists, not in showing that the defendants are the rightful owners, or claim under the rightful owner; but that the logs were found by them adrift in Mispillion creek, having been loosened from their fastening either by accident or design, and they insist that their title is as good as that of the plaintiff. But it is a well settled rule of law that the loss of a chattel does not change the right of property; and for the same reason that the original loss of these logs by the rightful owner, did not change his absolute property in them, but he might have maintained trover against the plaintiff upon refusal to deliver them, so the subsequent loss did not divest the special property of the plaintiff. It follows, therefore, that as the plaintiff has shown a special property in these logs, which he never abandoned, and which enabled him to keep them against all the world but the rightful owner, he is entitled to a verdict.

Verdict for the plaintiff.[7]

KNAPP & WORDEN v. WINCHESTER.

(Supreme Court of Vermont, 1839. 11 Vt. 351.)

Trover, for sundry articles of household goods. Plea—not guilty, and trial by jury.

It appeared, on the trial in the county court, that, in the summer of 1836, one Pratt and his wife were living at New Fane, where said Pratt was confined in close jail, and his wife became sick, and one or both became chargeable, as paupers, to said town; that an order of removal was thereupon obtained, treating said Pratt and wife as persons having their legal settlement in the town of Marlboro', which town was notified of said order. Their settlement in Marlboro' did not appear to have been ever disputed. It also appeared, that the

[7] Armory v. Delamirie, 1 Strange, 505 (1722); Brandon v. Bank, 1 Stew. (Ala.) 320, 18 Am. Dec. 48 (1828); Lowremore v. Berry, 19 Ala. 130, 54 Am. Dec. 183 (1851); Cook v. Patterson, 35 Ala. 102 (1859); Coffin v. Anderson, 4 Blackf. (Ind.) 395, 410 (1837); Duncan v. Spear, 11 Wend. (N. Y.) 54 (1833); Hughes v. Giles, 2 N. C. 26 (1794). Accord.

The rule is the same in detinue. Behr v. Gerson, 95 Ala. 438, 11 South. 115 (1891); Boyle v. Townes, 9 Leigh (Va.) 158 (1838). And in replevin. Paul v. Luttrell, 1 Colo. 317 (1871); Deaderick v. Oulds, 86 Tenn. 14, 17, 5 S. W. 487, 6 Am. St. Rep. 812 (1887) semble.

A fortiori a later possessor cannot sue a prior possessor. Deaderick v. Oulds, 86 Tenn. 14, 5 S. W. 487, 6 Am. St. Rep. 812 (1887: replevin).

plaintiff, Knapp, had previously contracted with said town of Marlboro', to support the poor of said town, for the year ending in March, 1837, for a specified sum; that the plaintiff, Worden, had joined said Knapp in a bond to said town, to secure the fulfilment of said contract. And the evidence tended to prove that the plaintiffs were jointly concerned in supporting the poor of said town, for that year. It also appeared that, upon receiving notice of said order of removal, said town of Marlboro' required of one or both the plaintiffs to support said Pratt and wife, as paupers belonging to said town;—That the plaintiffs did thereupon take charge of, and support the wife of said Pratt for the remainder of said year, at considerable expense; removing her first to Putney and afterwards to Marlboro', and that, with said woman, the plaintiffs received the property in question, being the household stuff and furniture of said Pratt and wife.

It appeared that said Pratt absconded, upon getting released from his said confinement. The evidence tended further to show, that, at different times during the year aforesaid, the plaintiffs remonstrated with the overseers of the poor at Marlboro', against supporting said woman, unless they could have the property aforesaid as a consideration, or part consideration, for so doing; insisting that while she continued to possess and own said property, she was not such a pauper as they were under contract to support. The evidence also tended to prove that the plaintiffs, for the reasons aforesaid, repeatedly claimed said property, and asserted their determination to retain the same to their own use, or to exact the value thereof; but it did not tend to prove that any of the overseers of the poor, or said Pratt or wife, ever acceded or assented to said claim of the plaintiffs. It further appeared that, after the year aforesaid had expired, one Kelsey contracted with said town of Marlboro' to support the poor of said town, (including the said Mrs. Pratt,) for the year succeeding; that, upon the 4th day of April 1837, the defendant, being one of the overseers of the poor of said town, went with said Kelsey to the house of the plaintiff, Worden, where said property was, for the purpose of receiving said property, to the end that said Kelsey might take and keep the same, with Mrs. Pratt, and for her use and convenience; that said Worden delivered the same, taking the defendant's receipt of that date for said property, and knowing that it was to go immediately into the possession of said Kelsey, who then received and carried it away. On this occasion said Worden repeated to the defendant his claim to said property, and declared his intention still to have it, or its value. It was further proved that, on the 15th day of December, 1837, said Worden sent his brother, Nathaniel Worden, to demand said property of the defendant; that it was demanded in presence of said Kelsey; that in answer to said demand the defendant said the property was in said Kelsey's possession, upon which Kelsey said, "Nathaniel cannot have it till my year is out." The defendant

said nothing further. It appeared that, at the expiration of said second year, said property, with Mrs. Pratt, was passed over by said Kelsey to one Morse, who succeeded Kelsey, in supporting the poor of said town.

Upon these facts, and the evidence aforesaid, the court decided that the action was not sustained,—and a verdict was thereupon returned for the defendant. To which decision of the court the plaintiffs excepted.

REDFIELD, J.[8] Two questions arise in the present case.

1. Have the plaintiffs shown any sufficient property to maintain the action?

2. Has the defendant been guilty of a conversion? * * *

In this view of the case, were the two propositions above stated sufficiently proved? It is not pretended that the plaintiffs showed any general property in the things sued for. They belonged to Pratt, and were in the custody of his wife. She had them for her own convenience, while with the plaintiffs. She gave no consent to plaintiffs' retaining them, neither did Pratt. The overseers of the poor had no right, nor did they attempt, to convey any interest to plaintiffs. The plaintiffs' right, then, after Mrs. Pratt left, was only that of a mere naked possession. This is of itself a sufficient title to sustain trover against any, but the one lawfully entitled to the possession. In this respect it matters not whether the possession be rightful or obtained by force or fraud. It is a sufficient title, in either case, to maintain trover against a mere stranger. But in the present case, the plaintiffs surrendered their possession for the benefit of Mrs. Pratt. Whatever right, then, they had acquired by that possession was as effectually gone, as if they had never had the possession. The plaintiffs did, indeed, at the time of giving up their possession, enter a protest against being thereby concluded in asserting their rights to the property. But this will not avail them as a substantial ground of recovery. It prevents any inference against them, but is no ground of inference in their favor. They did not even require of the defendant, on receiving the property, to stipulate a return of it. The receipt given is merely evidence of the possession having passed over to defendant by consent of plaintiffs. There is, then, no evidence in the case, tending to show any such right of property in the plaintiffs, as will warrant a recovery.

The court find no evidence of conversion by defendant. The taking was by consent of plaintiffs. The use was consistent with the intent for which it was delivered. The demand and refusal could be no evidence of conversion, the possession, at the time, not being in defendant. Smith v. Young, 1 Campbell, 440; Rice v. Clark, 8 Vt. 109.

Judgment affirmed.[9]

[8] Part of the opinion omitted.

[9] Clark v. Maloney, 3 Har. (Del.) 68 (1840) semble. Accord.

The same rule in detinue. Philips v. Robinson, 4 Bing. 106 (1827: prior possessor had conveyed his right to another).

SECTION 2.—NECESSARY ALLEGATIONS

DECLARATION IN TROVER.

(2 Chitty, Pleading [13th Am. Ed.] pp. *596, *835.)

In the Common Pleas.

——— next after ——— in ——— Term, ——— Will. 4.

———(to wit.) C. D. was attached to answer A. B. of a plea of trespass on the case, and thereupon the said A. B. by E. F. his attorney, complains, for that whereas the said plaintiff, heretofore, to wit, on, &c. at, &c. (venue) was lawfully possessed, as of his own property of certain * * * goods and chattels, to wit, ten horses * * * of great value, to wit, of the value of £———. of lawful money of Great Britain. And being so possessed, the said plaintiff afterwards, to wit, on the day and year first above mentioned, at &c. (venue) aforesaid, casually lost the said * * * goods and chattels, out of his possession; and the same afterwards, to wit, on the day and year first aforesaid, at, &c. (venue) aforesaid, came to the possession of the said defendant by finding. Yet the said defendant well knowing * * * the said goods and chattels, to be the property of the said plaintiff, and of right to belong and appertain to him, but contriving, and fraudulently intending craftily and subtly to deceive and defraud the said plaintiff in this behalf, hath not as yet delivered the said * * * goods and chattels, or any or either of them, or any part thereof, to the said plaintiff, although often requested so to do, and hath hitherto wholly refused so to do; and afterwards, to wit, on the day and year last aforesaid, at, &c. (venue) aforesaid, converted and disposed of the said * * * goods and chattels, to his own use. Wherefore the said plaintiff saith that he is injured, and hath sustained damage to the amount of £———., and therefore he brings his suit, &c.

WARREN v. DWYER.

(Supreme Court of Michigan, 1892. 91 Mich. 414, 51 N. W. 1062.)

Certain mortgagees of the property in question, after the alleged conversion by the defendant, a sheriff who levied on the goods, "assigned their cause of action against the sheriff to the plaintiff, and authorized him to prosecute the same in his own name." [10]

MORSE, C. J. * * * It is further contended that, as the plaintiff did not allege in his declaration the assignments of the mortgagees'

[10] This short statement is substituted for the more lengthy one given in the first part of the court's opinion, which is omitted.

right of action to him, they could not be introduced in evidence; that he could not recover under his declaration, which was in the usual form in trover, under the proofs in the case; citing the following cases: Draper v. Fletcher, 26 Mich. 154; Rose v. Jackson, 40 Mich. 30; Altman v. Fowler, 70 Mich. 57, 37 N. W. 708; Blackwood v. Brown, 32 Mich. 104; Cilley v. Van Patten, 58 Mich. 404, 25 N. W. 326; Dayton v. Fargo, 45 Mich. 153, 7 N. W. 758. These cases do not apply. In replevin and trover there is an authorized form of declaration for each action which is ordinarily used, and which has been held sufficient in each respectively. These declarations do not undertake to notify defendant of the nature of the plaintiff's title, or what are the evidences of it. These are matters of evidence merely.[11] Harvey v. McAdams, 32 Mich. 472; Myres v. Yaple, 60 Mich. 339, 27 N. W. 536; Williams v. Raper, 67 Mich. 427, 34 N. W. 890; Hutchinson v. Whitmore, 90 Mich. 255, 51 N. W. 451, 30 Am. St. Rep. 431. The judgment of the circuit court is affirmed, with costs.

The other justices concurred.

BAKER v. MALONE et al.

(Supreme Court of Alabama, 1900. 126 Ala. 510, 28 South. 631.)

Appeal from circuit court, Henry county; J. C. Richardson, Judge.

Action by Joe Baker, Jr., against Malone & Sons for damages alleged to have been occasioned by defendants' failure as warehousemen to deliver certain property intrusted to them. From a judgment for defendants, plaintiff appeals. Affirmed.

This action was brought by the appellant against the appellees. The complaint, as amended, was as follows: "The plaintiff claims of the defendants the sum of seventeen hundred and fifty dollars damages for that defendants were, during the latter part of the year 1897 and first part of the year 1898, engaged in the business of storage, compressing cotton, and keeping the same for shipment or forwarding, and issued their receipts for cotton so coming into their possession, and the delivery thereof to the compress; that during said season of 1897–98 the defendants received at the compress of Mr. W. P. Campbell sixty-six bales of cotton, giving their receipts for the same; that said receipts for said sixty-six bales of cotton were delivered by the said W. P. Campbell to the cashier of the Bank of Dothan, as security for advances made by said Bank of Dothan to said Campbell, and

[11] Jones v. Winckworth, Hardres, 111 (1658: that plaintiff had possession and defendant knew he owned goods sufficient after verdict); Sevier v. Holliday, 2 Ark. 512, 576 (1840) semble; Hasceig v. Tripp, 20 Mich. 216 (1870); Good v. Harnish, 13 Serg. & R. (Pa.) 99 (1825: same as Hardres, 111, above); Hawkins v. Pearce, 11 Humph. 44 (1850). Accord. Wolfenbarger v. Standifer, 3 Sneed (Tenn.) 659 (1856). Contra. See, further, 1 Chitty, Pleading (16th Am. Ed.) *394; 21 Pl. & Pr. 1063.

also to secure a debt due the plaintiff in this action by said Campbell; and that in February, 1898, the plaintiff purchased said sixty-six bales of said Campbell, paying the Bank of Dothan the debt of Campbell to them, applying the balance in settlement and cancellation of the said Campbell's debt to plaintiff, and thereupon received control and possession of the receipts for said sixty-six bales of cotton, and on demand of said cotton of the defendants they failed and refused to deliver the same to him, to his damages as aforesaid." The defendants demurred to the complaint upon the following grounds: (1) Said complaint fails to allege that defendants made a sale of the cotton intrusted to them. (2) Said complaint fails to allege that defendants incumbered or transferred said cotton with [without?] the assent in writing of the person to whom they gave the receipt, to wit, W. P. Campbell, or the legal holder of such receipts. (3) Said complaint fails to allege that the receipts given by the defendants to said Campbell were indorsed by said Campbell to plaintiff. (4) Said complaint fails to allege facts showing that plaintiff was the legal holder of the receipts mentioned therein at the time he made demand on defendants for said cotton. These demurrers were sustained, to which ruling the plaintiff duly excepted. The plaintiff declining to plead further, judgment was rendered for the defendants. The plaintiff appeals, and assigns as error the rulings of the court in sustaining the demurrers to the complaint.

McCLELLAN, C. J. This suit is by Baker against Malone & Sons. The complaint, in substance, alleges that one Campbell stored 66 bales of cotton with defendants as warehousemen, and took their receipts as warehousemen for the same; that plaintiff subsequently purchased this cotton from Campbell, and thereupon received possession and control of said receipts, the said Campbell delivering them to him; that plaintiff then demanded said cotton of defendants, but that they failed and refused to deliver the same to him, whereby plaintiff was damaged in the sum of $1,750, for which he sues. Defendants demurred to the complaint, the demurrer was sustained, and, plaintiff declining to amend, judgment was entered for defendants, and plaintiff appeals.

The complaint presents no cause of action in trover. It does not aver conversion by the defendants. Bolling v. Kirby, 90 Ala. 215, 7 South. 914, 24 Am. St. Rep. 789–819, note; Davis v. Hurt, 114 Ala. 146, 21 South. 468.

The legal title to the receipts executed by defendants was, upon the averments of the complaint, not in the plaintiff, because they had not been indorsed to him. Code, § 4222. There is no averment that Campbell, to whom the receipts were issued, had assented in writing that the property should be delivered to the plaintiff. There being no such assent, and the plaintiff not being the "legal holder of the receipts," the statute expressly forbade the defendants to deliver the cotton to him. Id. § 4221.

This cannot be contorted into an action for money had and received, for there is no averment that there had been a sale by defendants, and the receipt by them of the proceeds, even if such action would lie on these averments with those already in the complaint, which we do not decide. We therefore concur with the circuit court in its ruling on demurrer, and its judgment for the defendants must be affirmed.[12]

DUGGAN v. WRIGHT.

(Supreme Judicial Court of Massachusetts, 1892. 157 Mass. 228, 32 N. E. 159.)

The declaration was as follows: "And the plaintiff says that defendant has converted to his own use one meat cart, one spring wagon, one meat box-sleigh, the property of the plaintiff."

Exceptions were taken to the admission of evidence to prove the plaintiff's right to the goods as assignee of a mortgage covering them, and also to the admission of evidence to prove a conversion by the defendant.

BARKER, J.[13] 1. The declaration was in the form prescribed by Pub. St. c. 167, § 94,[14] for trover, and is sufficient to allow proof of all the facts necessary to maintain an action of that nature. The allegation that the defendant has converted the plaintiff's property to his own use is not an allegation of a conclusion of law, but of a fact which may be described as "composite," and it allows evidence to be introduced of all such unjustified dealing with the property named as may tend to show a wrongful taking and disposal of it to the prejudice of the plaintiff's rights.[15] Wells v. Connable, 138 Mass. 513. The allegation that the property converted was the property of the plaintiff is not an averment that the plaintiff was the absolute owner, but makes admissible any evidence showing that the plaintiff stood in such a relation to the property that she had a right to maintain the action.[16] The remedy has long been the usual one employed by mortgagees of personalty, and cannot be defeated by technical objec-

[12] Cumnock v. Institution, 142 Mass. 342, 347, 7 N. E. 869, 56 Am. Rep. 679 (1886); Steelman v. Nixon, 3 N. J. Law, 927 (1812). Accord. See, further, 21 Pl. & Pr. 1074.

[13] This short statement is substituted for the more extended one in the report, and part of the opinion is omitted.

[14] Statutory forms of declaration are not uncommon. Leon v. Kerrison, 47 Fla. 178, 36 South. 173 (1904); Richardson v. Hall, 21 Md. 399, 404 (1864).

[15] Richardson v. Hall, 21 Md. 399 (1864); Smith v. Thompson, 94 Mich. 381, 54 N. W. 168 (1892); Barron v. Davis, 4 N. H. 338, 346 (1828) semble. Accord. See, further, 21 Pl. & Pr. 1077.

[16] Harvey v. McAdams, 32 Mich. 472 (1875). Accord. Sevier v. Holliday, 2 Ark. 512, 576 (1840) semble. Contra.

Other allegations stating title and right to possession to be in the plaintiff will suffice. Mount v. Cubberly, 19 N. J. Law, 124 (1842).

tions such as are urged by the defendant. Alden v. Lincoln, 13 Metc. (Mass.) 204; Robinson v. Sprague, 125 Mass. 582. The proof of a written demand was evidence of a subsidiary fact showing conversion; and, under the construction given to the statute form of declaration in trover by the uniform practice of the courts, was properly admitted. The proof of a mortgage title in the plaintiff supported the allegation that the articles converted were her property, and was not a variance. * * *

Exceptions overruled.

ROYCE et al. v. OAKES.

(Supreme Court of Rhode Island, 1897. 20 R. I. 252, 38 Atl. 371.)

Trespass on the case by Royce, Allen & Co. against Charles H. Oakes. On defendant's demurrer to declaration. Overruled as to first count, and sustained as to second count.

TILLINGHAST, J.[17] This is an action of trespass on the case, in which the plaintiffs set out in the first count of their declaration that on the 15th day of January, 1894, they delivered to the defendant the sum of $1,714.60 in money, together with three gross of napkin rings, of the value of $49.26 (said money and goods being the property of the plaintiff), for safe-keeping, and to be redelivered by the defendant to the plaintiffs thereafterwards on the same day; that the defendant received said money and merchandise for the purpose aforesaid, yet, not regarding his duty in that behalf, afterwards, on the same day, intending and contriving to injure the plaintiffs, fraudulently and unlawfully converted said money and goods to his own use, and, although thereafterwards duly requested, he neglected and refused to deliver said money and goods, or any part thereof, to the plaintiffs. * * *

We think the demurrer to the first count should be overruled; for, while it is somewhat inartificially drawn, yet it sufficiently states a case in trover, which is a species of action on the case. It sets out property in the plaintiffs, alleging a value thereof, together with the conversion thereof by the defendant at a certain time and place, and we think this is sufficient; for while it is customary to incorporate into the declaration the legal fiction that the plaintiff casually lost[18] the goods and chattels described, and that the same thereafterwards came to the defendant's hands by finding,[19] yet we think it is sufficient to

[17] Part of the opinion omitted.

[18] The losing is not essential. Mayor v. Howard, 6 Ga. 213, 216 (1849) semble. Accord. Y. B. 21 & 22 Edw. I, 466 (1294). Contra.

[19] The finding is not essential. Peters v. Johnson, Minor (Ala.) 100 (1822); Mayor v. Howard, 6 Ga. 213, 216 (1849) semble; Glenn v. Garrison, 17 N. J. Law, 1 (1839) semble. Accord. Sevier v. Holliday, 2 Ark. 512, 576 (1840) semble. Contra.

allege that they came to his hands generally, the conversion being the gist of the action. See Oliv. Prec. (3d Ed.) 467; Gen. Laws R. I. c. 235, §§ 3, 4. * * *

The demurrer to the first count is overruled, the demurrer to the second count is sustained, and the case is remitted to the common pleas division for further proceedings.

SECTION 3.—DEFENSES

HURST v. COOK.

(Supreme Court of New York, 1838. 19 Wend. 463.)

Demurrer to a plea of property in a third person in an action of trover. The plaintiff, John Hurst, declared in trover, for the taking and conversion of certain goods and chattels belonging to him. The defendant pleaded that he as a deputy of the sheriff of Onondaga, by virtue of two executions against one Thomas Hurst, for the purpose of satisfying the same, took the goods and chattels specified in the declaration, "the same then and there being the property of the said Thomas Hurst." To which plea the plaintiff demurred, assigning as special causes of demurrer, that the plea amounted to the general issues.[20]

By the court, COWEN, J. I confess I supposed, upon the argument, that I should find the question raised, perfectly disposed of by cases in this court. But one case was cited, and so far as that goes, it is against the plea. It was sought to be distinguished, and indeed brought down to the force of a mere dictum; and it was insisted that the plea is maintainable on a correct understanding of the authorities. Having satisfied himself of this, the counsel went back to Rockwood v. Feasar, Cro. Eliz. 262, and The Archbishop of Canterbury v. Kemp, Id. 539. I shall notice what these cases are, in the course of my remarks. For the present I admit that the first case, if to be followed, will sustain not only this plea, but any imaginable special plea amounting to the general issue. The plea was an argumentative denial both of the plaintiff's property and of an illegal conversion by the defendant—the whole matter, and nothing but the matter involved in the general issue. In the second the plea was to the same effect, but the point was not raised, for the plaintiff replied. It was the more surprising to hear so late an authority as Wingfield v. Stratford, 1 Wils. 315, cited to the same point, but the report there is probably, as we shall see hereafter, imperfect, and in any view far from being an authority for the defendant. As the case stands in Wilson, nothing

[20] The form of the general issue is the same as in case.

is said of the point before us; but there is more in it than I could have supposed.

It must be admitted that the books are studded with special pleas in the action of trover, even such as show that the plaintiff never had any cause of action. They set up either property out of the plaintiff, or admit that it belonged to him, and insist that the defendant lawfully took and converted it: as that he distrained or took it in execution, or that he never did convert the property, and the like. Many such pleas have passed without being met by a special demurrer. Of course the courts felt bound to consider them. Such was the case of Kenicot v. Bogan, Yelv. 198, a plea that the defendant seized the plaintiff's wine as king's butler; The Archbishop of Canterbury v Kemp, Cro. Eliz. 539, a plea of title in the defendant; Robinson v. Walter, 3 Bulst. 269, and Stert v. Drungold, Id. 289, pleas of detention by an innkeeper of the goods of his guest; Wingfield v. Stratford, 1 Wils. 315, seizing a gun as gamekeeper. But Bull. N. P. 314, says, as we shall see, that the court held this bad, as being equivalent to the general issue. Taylor v. Chambers, Cro. Jac. 68, was a plea of purchase in market overt; Comyns v. Boyer, Cro. Eliz. 485, a like plea, (and see Golds. 54;) Priestly v. White, Yelv. 173, a plea of property in the defendant; Anon, Id. 174, cited, S. P.; Anon, 2 Leon. 13, a plea that the goods were bailed to the defendant, to deliver, which he had done, and traversing the conversion; Strangden & Burnell's Case, Godb. 137, a plea that the plaintiff gave goods to the defendant and traversing the conversion in the place where it was laid by the declaration, (4 Leon. 4, and 106, S. C.;) Court v. Blackman, Noy's R. 109, a like case; Markham & Pitt's Case, 3 Leon. 205, that the plaintiff was outlawed. The plea in Gaillard & Archer's Case, 1 Leon. 189, was possession of the plaintiff's goods by A. and sale to the defendant without notice, and held bad in substance. So in Davies' Case, Cro. Eliz. 611, of a plea that the defendant took the goods as a waif; in Gomendale v. Wyats, Cro. Jac. 255, of a plea of distress under a plaint in the manor court, (Yelv. 194, S. C., titled Gomersall v. Medgate;) in Holman v. Karwithy, 2 Bulstr. 134, of a plea of finding without traversing property in the plaintiff, and White v. Price, (cited there at page 135, S. P.;) Sparrow v. Sherwood, Poph. 208, a justification by command, pleaded imperfectly; Bush v. Luxburrough, 1 Roll. R. 396, a traverse of the venue improperly interposed, (and see per Popham, J., Goldsb. 155.)

Some cases assume that a special plea may be properly interposed, if it confess part of the plaintiff's case; as in Dee v. Bacon, Cro. Eliz. 435, which was a plea of taking damage feasant, and held bad because it did not confess the conversion. Agar & Lisle, Hob. 187, was a plea of distress for market-toll, held bad for the same reason; Salter v. Butler, Noy's R. 46, was a plea of distress for rent, held bad for the same reason; and Kinnersley v. Barnard, Cro. Eliz. 554, was a plea traversing a conversion, but of the wrong thing. Hartford

v. Jones, 2 Salk. 654, was a plea of seizure as wreck, and detaining till paid for the pains, and held bad because it did not confess a conversion. (1 Ld. Raym. 393, S. C. 3 Salk. 366, S. C.)

Several special pleas of a like character have been countenanced and directly sustained by the courts on demurrer, assigning for a cause that they amounted to the general issue. Such is Kinnersley v. Barnard, Cro. Eliz. 554, the case of a plea admitting property in the plaintiff and specially traversing the conversion with an absque hoc; Hill v. Hawkes, 1 Roll. R. 1, 44, justifying the taking by force of a custom; (2 Bulst. 201, S. C. and S. P.; Moore, 835, S. C. but not S. P.) Such is Rockwood v. Feasar, Cro. Eliz. 262, a plea of property out of the plaintiff, and in one J. S., by whose command the defendant took it, giving color and showing that the plaintiff had title against all except J. S. I repeat the admission before made, that if the last case be law, it exactly sustains the plea in the case at bar. Both of them deny the plaintiff's property and an illegal conversion. In Strausham's Case, Cro. Eliz. 98, Coke, J., mentions special pleas in trover as admissible, and among others a taking damage feasant. In Bisse & Tyler's Case Godb. 267, 13 Jac. it was put with a query whether a plea of a sale by the plaintiff to the defendant were bad as amounting to the general issue, and according to a report of the same case in 1 Roll. R. 173, the plea was thought good.

Most of the cases, however, ancient and modern, have overruled such pleas, on the point of their sufficiency being raised by special demurrer, assigning for cause that they amounted to the general issue. Such was Bellamy v. Balthrop, Latch. 184, the case of a plea giving color to the plaintiff, but showing property out of him; and Styles v. Snelgrave, (there cited, S. P.;) Ward v. Blunt, Cro. Eliz. 146, a plea showing title in the defendant, but giving color to the plaintiff; Ascue v. Saunderson, Cro. Eliz. 433, plea of a levy on the plaintiff's goods as sheriff under a fi. fa. against them; Wingfield v. Stratton, Bull. N. P. 48, a plea that the defendant seized the gun as gamekeeper, the point of form not being noticed by the report in 1 Wils. 314, S. C. as mentioned before; Webb v. Fox, 7 T. R. 387, a plea of the plaintiff's bankruptcy, which showed title out of him and in his assignees, (per Ld. Kenyon, Ch. J., Id. 392;) Lynner v. Wood, Cro. Car. 157, a plea that the defendant took the goods as tithes severed; Bullock v. Smith, Cro. Eliz. 174, a plea of seizure as waif; Austin v. Austin, Cro. Jac. 319, a plea of title in the defendant, giving color; Lord Mounteagle v. The Countess of Worcester, 2 Dyer, 121, *a*, a declaration alleging a conversion by a sale, and plea traversing the sale, per Rockbey, J.; Kennedy v. Strong, 10 Johns. 289, pleas of sale by order of the plaintiff's partner; but the pleas were also held bad on other grounds besides that of their being equivalent to the general issue.

The most ancient cases seem to be against this plea, Brooke, in his Abr. Action Sur le Case, pl. 113, cites the year book, 4 E. 6, and at

pl. 109, he cites 33 H. 8, to that effect. The cases of Whittaker v. Collet, 1 Roll. R. 22, Row v. Thompson, 1 Roll. R. 197, and Phillips v. Wickes, 3 Bulstr. 209, may also be added to the cases before cited as directly against the like pleas; and see also Vandrick and Archer's Case, 1 Leon. 221.

At a time when the judgments at Westminster Hall stood in singular conflict, and their reasoning and dicta on the subject of these special pleas in trover exhibited contradictions and subtleties no less extraordinary, as may be seen on a still closer examination of the cases, the courts adopted and have since steadily pursued, if they have not extended, the doctrine of that line of authority which, taken together, was found to repudiate all special pleas in trover going to the original cause of action. As early as Bellamy v. Balthrop, before cited, (2 Car.) Jones, J., said, that in trover every special plea with color amounts only to the general issue; and in 14 Car. Devoe v. Coridon, 1 Keb. 305, Twisden, J., said: "There is no plea in trover but a release or not guilty." In Anon, Lofft's R. 323, 13 Geo. 3, on a motion to plead several matters in trover, the court said, "by a book near two centuries ago, it appears release is a sufficient plea to trover, and you have no need to plead anything more. In Hartford v. Jones, Holt, Ch. J., said he never knew but one special plea good in trover, viz. Yelv. 198. In the same case (1 Ld. Raym. 868,) he is made to say he never knew but one special plea good in trover besides that in Yelv. and that was a release. In Yorke v. Grenaugh, 2 Ld. Raym. 868, he said nothing can be pleaded specially in trover but a release. See Allen v. Harris, 2 Lutw. 650, where the right to plead a release was conceded. And Buller's report of Wingfield v. Stratford says it was holden by the whole court in that case, that there could be no special plea in trover but a release. 1 Danv. Abr. 25, S. P. Such a limit is probably too narrow; but special pleas in trover have met with much discouragement in the later cases. In Webb v. Fox, before cited, Lord Kenyon, Ch. J., said he could not commend the mode in which the question was brought before the court, as the plea would be attended with unnecessary expense to the parties, (7 T. R. 392;) and in Kennedy v. Strong, also before cited, this court said special pleas in trover are deservedly discountenanced, (10 Johns. 291.) It is said in 1 Chit. Plead. 490, that the statute of limitations and a former recovery may be pleaded; and such pleas were interposed without question, the former in Cowper v. Towers, 1 Lutw. 97, 99, and the latter in Lethmere v. Toplady, 1 Show. 146; 2 Ventr. 169, S. C., cases cited by Chitty, though in neither was the plea tested by a special demurrer. See, also, Lacon v. Bernard, Cro. Car. 35, and Peet v. Rawsterne, T. Raym. 472, and 2 Ld. Raym. 1217. Buller's N. P. 49, agrees that a former recovery may be pleaded: and a highly respectable American court held that the statute of limitations must be pleaded, and cannot be given in evidence under the general issue. Nott, J., said this is

perfectly well settled, (Jones v. Dugan, 1 McCord [S. C.] 428;) and so it seems to be in respect to various actions on the case besides trover. Ballantine on Lim. by Tillingh. c. 16, p. 207, et seq., and the cases there cited.

It is also said in 1 Chitty's Pl. 490, that the defendant may, in trover, plead anything specially which admits property in the plaintiff and a conversion by the defendant. I think he might have added that a special plea showing either property out of the plaintiff or that there was no conversion, or both, would be bad on special demurrer, as amounting to the general issue. It may be taken as the clear result of the more numerous cases, including the modern authorities, of the course of which this court strongly intimated its approbation in Kennedy v. Strong, that a special plea showing there never was an unlawful conversion of the plaintiff's property, or in other words, that he never had any cause of action, is bad in form. But where the plea admits that there once was a cause of action, and sets up subsequent matter in discharge or avoidance, it may be pleaded specially. The general issue is, not guilty of the premises, &c. In good sense, this denies all which the plaintiff, in legal effect, alleges in his declaration, viz., property in himself and an illegal conversion by the defendant. The evidence on such an issue, so long as it is confined to the original cause of action, comes literally within the scope of the pleadings, as remarked by King, Ch. J., in regard to other actions on the case: "Everything which shows that the defendant did what he might do, may be given in evidence upon not guilty pleaded; for that proves he had done no injury." Anon, Com. Rep. 274. It is not necessary to say that the defendant must plead even matter in discharge or avoidance. We know that generally he need not, though he may do so in actions of assumpsit, and especially in other actions on the case. 1 Chitty's Pl. 486, and the cases there cited. I have noticed the statute of limitations as a defence, which it is said must be pleaded. So of justification in slander. But I do not now remember any other exception to the rule that, in an action on the case, every matter of defence may be received under the plea of not guilty. In Bird v. Randall, 3 Burr. 1353, 1 Black. Rep. 288, S. C., Lord Mansfield made no exception. Of course I speak of pleas in bar, not in abatement.

So many old cases occurring which certainly do go to sustain the plea in the principal case, I have taken some pains to discover how they have been met and overturned, if such were the fact. I encountered more labor from not being able to find that the matter had been systematically taken up by any author. I may have failed to find some material cases, but as far as I have examined, I feel well satisfied with the results, already expressed; and at least, that authority, reason, and convenience, all concur against the plea in question. The best collection of the old authorities is to be found in Vin. Abr. Actions of Trover, &c., L. 5, Trover, Plea, vol. 1, p. 254, et seq. The

remark in Petersdorf's Abr. Trover, Pl. 5, (B.,) Plea, note, that the defendant may plead any matter which admits the conversion, and that the property is in the plaintiff, but justifies the former, I am satisfied is wrong. See accordingly, Bac. Abr. Trover, (F.) pl. 2, of the plea.

I presume the general issue has been pleaded, though very properly omitted in the demurrer book. If so, no amendment is necessary. If otherwise, the defendant may now add the general issue.

Judgment for the plaintiff.[21]

[21] The uncertainty existing in the early cases still persists to a considerable extent. The citations in the following paragraphs are typical.

All questions concerning the possession, right to possession, or title to the goods may be entered upon under not guilty. Fields v. Brice, 108 Ala. 632, 18 South. 742 (1895); Vaden v. Ellis, 18 Ark. 355 (1857); Gates v. Thede, 91 Ill. App. 603 (1900); Graham v. Warner, 3 Dana (Ky.) 146, 28 Am. Dec. 65 (1835); Foye v. Patch, 132 Mass. 105 (1882); Trust Co. v. Hardwood Co., 74 Miss. 584, 593 (1896) semble; Sylvester v. Girard, 4 Rawle (Pa.) 185 (1833); Winlack v. Geist, 107 Pa. 297, 300, 52 Am. Rep. 473 (1884) semble. Accord. In Florida by Cir. Ct. Com. Law Rule No. 75 the law is contra. Robinson v. Hartridge, 13 Fla. 501, 508 (1869–71); Anderson v. Agnew & Co., 38 Fla. 30, 38, 20 South. 766 (1896). Probably special pleas raising any question as to possession, right to possession, or title would be bad in form. Coffin v. Anderson, 4 Blackf. (Ind.) 395 (1837); Turner v. Waldo, 40 Vt. 51 (1867) semble. Accord. Vaden v. Ellis, 18 Ark. 355, 359 (1857) semble. Contra.

That the facts constituting a prima facie conversion may be overthrown under a plea of not guilty seems never to have been disputed. A special plea denying such facts would be bad. Coffin v. Anderson, 4 Blackf. (Ind.) 395 (1837).

Matters in excuse may be proved under not guilty. Barrett v. City, 129 Ala. 179, 185, 30 South. 36, 87 Am. St. Rep. 54 (1900: justification as health officer) semble; Jones v. Buzzard, 2 Ark. 415, 442 (1840: legal process); Hart v. Hart, 48 Mich. 175, 12 N. W. 33 (1882: consent: compare Cir. Ct. Rule No. 7 referred to below); Drew v. Spaulding, 45 N. H. 472 (1864: defense of property); Briggs v. Brown, 3 Hill (N. Y.) 87 (1842: distress for rent); Knapp v. Miller, 133 Pa. 275, 283, 19 Atl. 555 (1890: defense of property); Pemberton v. Smith, 3 Head (Tenn.) 18 (1859: legal process); Turner v. Waldo, 40 Vt. 51 (1867: estoppel). In Michigan, Cir. Ct. Rule No. 7 requires notice of all affirmative defenses. Under this rule the court has held that the defense of legal process cannot be proved under not guilty without special notice. Wait v. Kellogg, 63 Mich. 138, 144, 30 N. W. 80 (1886); Hine v. Bank, 119 Mich. 448, 78 N. W. 471 (1899). But the court has refused to apply this rule unless the plaintiff's title is specifically set forth in the declaration. Eureka Works v. Bresnahan, 66 Mich. 489, 33 N. W. 834 (1887); Williams v. Brown, 137 Mich. 569, 100 N. W. 786 (1904). Probably the commoner view is with the principal case that matter in excuse cannot be specially pleaded. Briggs v. Brown, 3 Hill (N. Y.) 87 (1842: distress for rent); Spalding v. Preston, 21 Vt. 9, 50 Am. Dec. 68 (1848: right as officer to retain evidence of a crime) semble; Turner v. Waldo, 40 Vt. 51 (1867: estoppel). Accord. Hopkinson v. Shelton, 37 Ala. 306 (1861: legal process: on ground, erroneous possibly, that statute had changed the rule); Carey v. Dazey, 5 Har. (Del.) 445 (1854: distress damage feasant). Contra.

MILLER et al. v. MANICE.

(Court of Errors of New York, 1843. 6 Hill, 114.)

Action of trover for the conversion of three promissory notes. The general issue was the only plea. The defendant offered evidence tending to prove that the plaintiffs had previously brought an action of assumpsit against him and two other defendants and that they had failed in that suit to recover the amount of these three notes.[22]

After the introduction of the above evidence in respect to the former suit, and some additional testimony, the parties rested. The circuit judge thereupon charged the jury in substance as follows, viz: "That a prior judgment was admissible under the general issue, in an action of trover, with the like effect as if pleaded; that the question whether the matter now in issue had been before adjudicated, was a question of law for the decision of the court; that in judgment of law the question of Manice's liability was determined in the suit brought in the superior court against Manice, Phelps and Foote; and that the said suit was a complete bar to the plaintiff's recovery in this suit." Verdict in favor of Manice. The plaintiffs afterwards moved the supreme court for a new trial on a bill of exceptions, but the motion was denied and judgment rendered against them; whereupon they brought error to this court.

WALWORTH, Chancellor, after concluding that the former judgment would not bar this suit no matter how pleaded, proceeded as follows:[23]

Again, it appears to be pretty well settled that in actions of assumpsit, where any thing which shows that the plaintiff has no subsisting right of action may be given in evidence under the general issue, a former verdict and judgment may be given in evidence without being pleaded. Young v. Black, 7 Cranch, 565, 3 L. Ed. 440; Kilheffer v. Herr, 17 Serg. & R. (Pa.) 322, 17 Am. Dec. 658; Wood v. Jackson, 8 Wend. 9, 22 Am. Dec. 603. But it does not appear to be perfectly settled in England that the former recovery, when given in evidence under the general issue in assumpsit, where it might have been pleaded, is conclusive as a flat bar, as it would have been if pleaded in bar of the second suit. See Stafford v. Clark, 1 Car. & Payne, 403; 9 J. B. Moore, 724, S. C. The cases in which the courts in this state and in England have held the former verdict and judgment conclusive as a bar, when given in evidence without being pleaded, are those in which the party insisting upon the estoppel has had no

[22] This short statement is substituted for a more extended one in the report.

[23] This statement is substituted for the portion of the opinion in which the above conclusion was reached.

opportunity to plead it; as in an action of ejectment, where special pleading is not allowed, (Wood v. Jackson, 8 Wend. 35, 22 Am. Dec. 603,) or in cases where the plaintiff's own title is by estoppel, and the defendant, by his pleading, does not give him an opportunity to reply the estoppel, (Wright v. Butler, 6 Wend. 284, 21 Am. Dec. 323; Burt v. Sternburgh, 4 Cow. 559, 15 Am. Dec. 402).

The general rule, however, unquestionably is, that where the party in whose favor the former verdict and judgment were rendered, wishes to rely on them as a conclusive bar, or as an estoppel, he must plead such former judgment in bar, if he has an opportunity to do so. And if he neglects to set it up by pleading, and puts the same matter again in issue to be tried, the jury may decide such issue according to the right and justice of the case as it appears to them from the evidence, notwithstanding the verdict and judgment in the former suit. Trevivan v. Lawrence, 1 Salk. 276; Outran v. Morewood, 3 East, 346; Howard v. Mitchell, 14 Mass. 241; Kilheffer v. Herr, 17 Serg. & R. (Pa.) 319, 17 Am. Dec. 658. Bird v. Randall, 3 Burr. 1345, was not a case of estoppel, but of a former recovery against a third person, for the same demand. A former recovery against the defendant for the same debt or claim must necessarily be an absolute defence to a second suit for the same cause, whenever it can be given in evidence under the general issue. But I have not been able to find any decision, either in the courts of this country or of England, in which an action of trover, or a special action of the case, has been held to form an exception to the general rule that, to make a mere estoppel a flat bar in a second suit, it must be pleaded. On the contrary, I find that this general rule has in England been applied to actions on the case as well as to other actions. Vooght v. Winch, 2 Barn. & Ald. 662; Hooper v. Hooper, McClel. & Younge, 509. And the court whose decision we are now considering, in a recent case, appears to have conceded that a former recovery may be pleaded in bar to an action of trover. See Briggs v. Brown, 3 Hill, 87.

The judge who tried this cause was therefore wrong in holding the record of the former verdict and judgment an absolute bar when given in evidence under the general issue, where the defendant might have pleaded it as an estoppel, if the former suit was in fact for the same matter.

For these reasons the law as well as the justice of this case is with the plaintiffs in error; and the judgment of the court below should be reversed.

PUTNAM, Senator.[24] The first question which arises in this case is, whether the evidence respecting the former suit was admissible under the general issue. The rule is well established that in actions

[24] The opinion of Senator Bockee is omitted.

of trover the defendant may give in evidence any defence under a plea of the general issue, except the statute of limitations, and perhaps a release. Many authorities might be cited to sustain this position, but I will only refer to the case of Young v. Rummell, 2 Hill, 478, 481, 38 Am. Dec. 594, where the supreme court laid down the doctrine as follows: "A former recovery in which the same matter was tried upon the merits, between the same parties, may be given in evidence, without being specially pleaded, wherever the party, whether plaintiff or defendant, had no opportunity to plead the recovery specially. For example, the defendant may give the judgment in evidence under not guilty in ejectment and trover—no other plea being allowed in those actions."

When a former suit is properly received in evidence under the general issue, I think it should be just as conclusive in all cases as though the defendant had pleaded the matter specially. The decisions on this subject present a greater diversity of judicial opinion than has existed in respect to almost any other question; some of them holding that if the defendant omit to plead the former suit specially, where he has an opportunity of so doing, it is not conclusive, but only evidence for the consideration of the jury, which they may disregard; while others hold that the effect of the former suit depends in no degree upon the time or manner of bringing it forward, but upon the general doctrine of res judicata. The latter is obviously the view taken of the question by Chief Justice De Grey, in delivering the unanimous opinion of the judges on the trial of the Duchess of Kingston, 20 How. St. Tr. 537, 538. He there said, "that the judgment of a court of concurrent jurisdiction directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court." This rule was especially recognized and acted upon in Gardner v. Buckbee, 3 Cow. 120, 15 Am. Dec. 256, and that case has been regarded as law ever since. The action was originally brought in the common pleas to recover upon one of two notes given to the plaintiff on the purchase of a schooner, and the defendant set up fraud in the sale. It appeared that the plaintiff had previously attempted to recover upon the other note in the marine court, but the same defence was interposed, and the defendant obtained judgment. On the trial of the second suit the record of the judgment was given in evidence under the general issue, together with a parol proof to identify the matters litigated; the defendant insisting that the judgment was a bar. The common pleas decided that the evidence was admissible, and allowed it to go to the jury, in connection with the other proof of the alleged fraud, for their consideration; but expressly instructed them that the former judgment was not conclusive. The supreme court held the charge to be erroneous, saying: "The judge ought to have charged that if, from the evidence, they were satisfied the matters in question

had been passed upon in the marine court, the record was conclusive." The case of Burt v. Sternburgh, 4 Cow. 559, 15 Am. Dec. 402, is to the same effect. In Wood v. Jackson, 8 Wend. 24, 25, 22 Am. Dec. 603, Chief Justice Savage observed that the decisions had not been uniform, and he expressed a doubt as to where the weight of authority lay. But in Lawrence v. Hunt, 10 Wend. 83, 84, 25 Am. Dec. 539, Nelson, J., evidently inclined to the opinion that the former suit was to be regarded as conclusive. The case of Kitchen and others, assignees, &c., v. Campbell, 3 Wils. Rep. 304, is in several respects analogous to the present. That was an action of assumpsit for money had and received to the use of the plaintiffs, as assignees of a bankrupt. The bankrupt, being indebted to Campbell for borrowed money, gave him a judgment, on which execution was issued to the sheriff of Surry, who collected the amount out of the bankrupt's goods. The commission of bankruptcy was not awarded until after the levy under Campbell's execution, but an act of bankruptcy had been committed before the judgment was obtained. Campbell pleaded the general issue, and proved at the trial that the plaintiffs had brought a previous action of trover against the sheriff of Surry together with Campbell, for the goods levied on under the execution, wherein the defendants obtained a verdict and judgment; and the court decided unanimously that this constituted a bar to the second action. "We are of opinion," they said, "that the plaintiffs, having brought trover in this court against the sheriff of Surry and the now defendant, to recover the value of the goods of the bankrupt taken in execution, (which action well laid,) have made their election; and there being a verdict and judgment upon record in that action against the plaintiffs, they are barred from having the present or any other action; for you shall not bring the same cause of action twice to a final determination: nemo debet bis vexari, upon this we found our judgment; and what is meant by the same cause of action is, where the same evidence will support both the actions, although the actions may happen to be grounded on different writs. This is the test to know whether a final determination in a former action is a bar or not to a subsequent action."

The case last cited disposes of the question as to the conclusiveness of a former verdict and judgment, when offered in evidence under the general issue.

He also thought that, as a matter of substantive law, the former judgment was a bar.[25]

On the question being put, "Shall this judgment be reversed?" the members of the court voted as follows:

For reversal: The CHANCELLOR, and Senators BARTLIT, BOCKEE,

[25] This statement is substituted for the portion of the opinion in which this conclusion was reached.

DIXON, ELY, FOSTER, FRANKLIN, LAWRENCE, LOTT, PLATT, PORTER, RHOADES, SCOTT and WRIGHT—14.

For affirmance: Senators DENNISTON, HARD, PUTNAM, SCOVIL and WORKS—5.

Judgment reversed.[26]

[26] Picquet v. McKay, 2 Blackf. (Ind.) 465 (1831). Accord.

Generally, when former recovery is admissible under the general issue, it has the same conclusive effect as if it were pleaded specially. Burrows v. Jemino, 2 Str. 733 (1738); Bird v. Randall, 3 Burr. 1345, 1353 (1762) semble; Kapischki v. Koch, 180 Ill. 44, 47, 54 N. E. 179 (1899) semble; Warren v. Comings, 6 Cush. (Mass.) 103 (1850); Wood v. Jackson, 8 Wend. (N. Y.) 10, 35, 22 Am. Dec. 603 (1831) semble; Young v. Rummell, 2 Hill (N. Y.) 478, 38 Am. Dec. 594 (1842); Gilchrist v. Bale, 8 Watts (Pa.) 355, 358, 34 Am. Dec. 469 (1839) semble; Young v. Black, 7 Cranch, 565, 3 L. Ed. 440 (1813); Mason v. Eldred, 6 Wall. 231, 234, 18 L. Ed. 783 (1867) semble; Whitney v. Town, 18 Vt. 252, 255, 46 Am. Dec. 150 (1846) semble. Accord. Vooght v. Winch, 2 B. & Al. 662 (1819); Picquet v. McKay, 2 Blackf. (Ind.) 465 (1831); Miller v. Manice, 6 Hill (N. Y.) 114 (1843). Contra.

Aside from the defenses of the statute of limitations and release, defenses in discharge cannot be pleaded in confession and avoidance. Devoe v. Coridow, 1 Keb. 305 (1662); Yorke v. Grenough, 2 Ld. Raym. 868 (1704) semble; Webb v. Fox, 7 D. & E. 391 (1797) semble; Comyn, Digest, Action on Case on Trover, G, 6. Accord. Vaden v. Ellis, 18 Ark. 355, 358 (1857) semble; Briggs v. Brown, 3 Hill (N. Y.) 87 (1842) semble. Contra. A fortiori they are admissible under the general issue. Thomas v. Watt, 104 Mich. 201, 62 N. W. 345 (1895: but compare Mich. Cir. Ct. Rule No. 7).

The statute of limitations must be pleaded in confession and avoidance. Vaden v. Ellis, 18 Ark. 355, 358 (1857: possibly says court) hardly a semble: Jones v. Dugan, 1 McCord (S. C.) 428 (1821); 1 Chitty, Pleading (13th Am Ed.) 498; 2 Saund. Pl. & Ev. 1142. Accord.

A release must be specially pleaded. Devoe v. Coridow, 1 Keb. 305 (1662) semble; Hartford v. Jones, 1 Ld. Raym. 393 (1698) semble; Yorke v. Grenough, 2 Ld. Raym. 868 (1704) semble; Hawley v. Peacock, 2 Camp. 558 (1811) semble; Vaden v. Ellis, 18 Ark. 355, 358 (1857) semble; Graham v. Warner, 3 Dana (Ky.) 146, 149, 28 Am. Dec. 65 (1835) semble; Comyn, Digest, Action on Case on Trover, G, 6. Accord.

CHAPTER V

REPLEVIN

SECTION 1.—SCOPE OF THE ACTION

PRESGRAVE v. SAUNDERS.

(Court of Queen's Bench, 1704. 1 Salk. 5.)

Replevin for several goods taken in a chamber in Devereux Court; defendant pleaded actio non quia dic quoad such and such, proprietas eorum fuit ipsi def. absque hoc, That the property of them was in the plaintiff, & hoc paratus est verificare; & quoad others dicit quod proprietas eorum fuit in quodam Richardo Frith, absque hoc, quod fuit querenti, & hoc paratus est verificare. Unde pet. judic. si praed. quer. actionem suam habere debeat, &c. pet. etiam retorn. bonorum, &c. cum dampnis, &c. Upon demurrer Mr. Ward objected, that property in a stranger ought to be pleaded in abatement, and not in bar. Cur. contra: It has been adjudged otherwise, and the law is otherwise, for it utterly destroys the plaintiff's action: and, whether the defendant or a stranger have the property, it is all one to the plaintiff since he has it not. Vide 31 H. 6. 12; 39 H. 6. 35; 2 Lev. 92; 1 Ven. 249.[1]

[1] Martin v. Ray, 1 Blackf. (Ind.) 291 (1823); Parsley v. Huston, 3 Blackf. (Ind.) 348 (1834); Tuley v. Mauzey, 4 B. Mon. (Ky.) 5 (1843); Harrison v. McIntosh, 1 Johns. (N. Y.) 380, 385 (1806); Prosser v. Woodward, 21 Wend. (N. Y.) 205, 209 (1839); Pattison v. Adams, Lalor's Supp. (N. Y.) 426 (1844); Dermott v. Wallach, 66 U. S. 96, 17 L. Ed. 50 (1861). Accord.

Such a plea must conclude with a traverse of the plaintiff's title. Robinson v. Calloway, 4 Ark. 94, 101 (1842); Atkins v. Byrnes, 71 Ill. 326 (1874) semble; Chase v. Allen, 5 Allen (Mass.) 599 (1863) semble; Brown v. Bissett, 21 N. J. Law, 267, 274 (1848) semble; Prosser v. Woodward, 21 Wend. (N. Y.) 205 (1839) semble; Pringle v. Phillips, 1 Sandf. (N. Y.) 292 (1848).

Such a plea is for all purposes a traverse. Uncapher v. Co., 112 Fed. 899 (1902: Pennsylvania law, plaintiff has burden of proof); Anderson v. Talcott, 1 Gilman (Ill.) 365, 371 (1844: plaintiff has burden of proof); Reynolds v. McCormick, 62 Ill. 412 (1872: good discussion); Pease v. Ditto, 189 Ill. 456, 468, 59 N. E. 983 (1901) semble; Gentry v. Bargis, 6 Blackf. (Ind.) 261 (1842: burden of proof on plaintiff); Pope v. Jackson, 65 Me. 162 (1876: same as last); Benesch v. Weil, 69 Md. 276, 14 Atl. 666 (1888: same as last); Bemus v. Buckman, 3 Wend. (N. Y.) 668 (1829: special verdict finding title neither in defendant nor in third party insufficient unless it also finds that plaintiff has title).

The inducement of the plea is not traversable. Pope v. Jackson, 65 Me. 162 (1876) semble; Boswell v. Green, 25 N. J. Law, 390 (1856); Prosser v. Woodward, 21 Wend. (N. Y.) 205 (1839). The inducement need not be proved by the defendant. Simcoke v. Frederick, Smith (Ind.) 64 (1848); Rogers v. Arnold, 12 Wend. (N. Y.) 30 (1834). Accord. But see McLeod v. Johnson,

WALPOLE v. SMITH.

(Supreme Court of Indiana, 1837. 4 Blackf. 304.)

Error to the Marion Circuit Court.

DEWEY, J.[2] * * * The facts are as follows: Walpole obtained a judgment before a justice of the peace against Lang. Execution issued upon it, which was placed in the hands of Smith, a constable, to be executed. He levied upon the chattels in dispute, and left them in the possession of Walpole. The property belonged to Lang. While it remained in the possession of Walpole, and before the return-day of the execution, the latter was quashed by the justice, the levy set aside, and the execution recalled; all which appears by the return of the execution made by Smith. After these proceedings, Smith demanded the property of Walpole, and, on his refusal to deliver it to him, brought this action. * * *

The other point arising in this case—that of the right of Smith under the evidence to sustain the action—is of a more doubtful character.

The books contain a great number of cases in which the right of property has been decided in the various actions of trespass, trover, and replevin. In considering the kind of interest necessary to support the latter, some of the decisions have ranked it with trespass, some with trover, and others again have distinguished it from both, classing trover and trespass together. All, however, American and English, with one exception, have concurred in one point as to the defense in replevin—that property in a stranger is a good plea. The exception is to be found in the argument, rather than adjudication, of the Supreme Court of New York in the case of Rogers v. Arnold, 12 Wend. 30. It is there contended that in replevin and trover, as well as in trespass, the defense of property in a stranger, to be valid, must go one step further and connect the interest of the defendant with that of the stranger. That this is true in regard to the latter form of action, which is founded upon possession, is readily granted; but that the same doctrine can be applied to the two former, which are based upon property, and so admitted to be in the opinion in question, is not so easily perceived.

And it also seems to be no easy task to clear from the charge of inconsistency those decisions which have held that mere naked possession, without the right of property general or qualified, is sufficient to maintain replevin, and at the same time have conceded that the plea of property in a stranger, without further averment, is a good defense. To say that possession is prima facie evidence of the right of property does not remove the difficulty. As it is only prima facie, it may be re-

96 Me. 271, 279, 52 Atl. 760 (1902). The plea is good though the inducement be bad. Lamping v. Payne, 83 Ill. 463 (1876). Accord. Anstice v. Holmes, 3 Denio (N. Y.) 244 (1846). Contra.

[2] Part of the opinion omitted.

butted and destroyed by testimony showing that the real title is elsewhere. It is not upon the principle that possession is prima facie evidence of title, that trespass de bonis asportatis can be sustained. It is that the tortious taking of goods is an injury to the possession itself. The right of property, therefore, in that action can only be urged by the true owner, or some one claiming under him. This doctrine we believe not to be applicable to replevin, and that to apply it to that action would be inconsistent with the well settled rule that property in a stranger is a good defense. That trover and replevin can be sustained by bailees presents no difficulty. Bailees have a qualified property in the subject of bailment. It is founded on contract.

But it is unnecessary to pursue this subject and to attempt, by an analysis of the conflicting cases, to preserve the distinguishing feature of the action of replevin in regard to the kind of interest necessary to support it—a task of much labor and some difficulty. The result has been anticipated. This Court has heretofore decided that, to sustain the action, there must be either a general or special property and the right of immediate possession in the plaintiff. Chinn v. Russell, 2 Blackf. 172; Parsley v. Huston, 3 Blackf. 348. These decisions are fully sustained by the following authorities: 1 Inst. 145 b; 18 Vin. Abr. 577, 8, 9; 10 Mod. 25; Selw. N. P. (4th Am. Ed.) 364; 2 Stark. Ev. (5th Am. Ed.) 714; Wheeler v. Train, 3 Pick. (Mass.) 255; Wyman v. Dorr, 3 Greenl. (Me.) 183; Waterman v. Robinson, 5 Mass. 303.

Smith, by the levy of the execution, acquired a special property in the goods, which continued while the execution remained in force, and ceased when that, together with the levy, was set aside by the justice. With the extinguishment of his special property, his right of action ceased; for a bailor can not sue his bailee for a return, after his right of property in the thing bailed has been destroyed. 4 Bingh. 106. So soon as the lien acquired by Smith in consequence of his levy was done away, the right of possession reverted to Lang, in whom was the general right of property. This event occurred before Smith made the demand upon Walpole for the goods. At no time before he made the demand had he cause of action, because until then there was no detainer; and he had none afterwards, because his right of property ceased from the time of quashing the execution.

We are of opinion that Smith could not sustain this action.

Per Curiam. The judgment is reversed, and the proceedings subsequent to the issues in fact set aside, with costs. Cause remanded, &c.[3]

[3] Bacon's Case, Cro. Eliz. 475 (1596); Butcher v. Porter, 1 Salk. 94 (1672); Robinson v. Calloway, 4 Ark. 94, 101 (1842); Dixon v. Thatcher, 14 Ark. 141 (1853); Anderson v. Talcott, 1 Gilman (Ill.) 365, 371 (1844) semble; Cullum v. Bevans, 6 Har. & J. (Md.) 469 (1825) semble; Whitwell v. Wells, 24 Pick. (Mass.) 25, 30 (1834) semble; Phillips v. Townsend, 4 Mo. 101 (1835); Chambers v. Hunt, 18 N. J. Law, 339, 347 (1841) semble; Harrison v. McIntosh, 1 Johns. (N. Y.) 380, 385 (1806) semble; Ingraham v. Hammond, 1 Hill (N. Y.)

OSGOOD v. GREEN.

(Superior Court of New Hampshire, 1855. 30 N. H. 210.)

Appeal from the judgment of a justice of the peace. The action was replevin for a three years old bull; and the declaration alleged that the defendant, on the 14th day of June, 1852, in a certain close described in the declaration, took the bull and unjustly detained him.

The defendant avowed and justified the taking of the bull as damage-feasant, but did not avow or justify, or in any way answer or defend the detention, and issue was joined on the question of damage.

The plaintiff demurred to the avowry. * * *

EASTMAN, J.[4] This case, though very brief, presents two questions, and one of them has required considerable examination. * * *

The second question is a more difficult one; but after considerable examination, we think that the demurrer must be overruled. The avowry is objected to on the ground that, while it justifies the taking, it leaves unanswered the detention; and this objection rests upon the position that our statute has extended the remedy of replevin to cases of wrongful detention, to which it did not apply at common law,[5] and

353 (1841); Pattison v. Adams, 7 Hill (N. Y.) 126, 42 Am. Dec. 59 (1845) semble; Marsh v. Pier, 4 Rawle (Pa.) 273, 283, 26 Am. Dec. 131 (1833) semble. Accord. Stockwell v. Robinson, 9 Houst. (Del.) 313, 32 Atl. 528 (1892); Van Namee v. Bradley, 69 Ill. 299 (1873); Cummins v. Holmes, 109 Ill. 15 (1884); Johnson v. Neale, 6 Allen (Mass.) 227 (1863); Odd Fellows v. McAllister, 153 Mass. 292, 26 N. E. 862, 11 L. R. A. 172 (1891); Sanford v. Millikin, 144 Mich. 311, 107 N. W. 884 (1906); Pangburn v. Partridge, 7 Johns. (N. Y.) 140, 5 Am. Dec. 250 (1810) semble; Clark v. Skinner, 20 Johns. (N. Y.) 465, 11 Am. Dec. 302 (1823) semble; Rogers v. Arnold, 12 Wend. (N. Y.) 30 (1834) semble; Miller v. Adsit, 16 Wend. (N. Y.) 335 (1836); Mead v. Kilday, 2 Watts (Pa.) 110 (1833). Contra.

Wrongful possession is not enough. Knox v. Hellums, 38 Ark. 413 (1882) semble; Parham v. Riley, 4 Cold. (Tenn.) 5 (1867).

Right to possession suffices. Hudson v. Snipes, 40 Ark. 75 (1882); Shipton v. Norrid, 1 Colo. 404 (1871); Hazzard v. Burton, 4 Har. (Del.) 62 (1843); Cleaves v. Herbert, 61 Ill. 126 (1871); Chinn v. Russell, 2 Blackf. (Ind.) 172 (1828); Gleason v. Drew, 9 Me. 79 (1832); Grosvenor v. Phillips, 2 Hill (N. Y.) 147 (1841); Miller v. Warden, 111 Pa. 300, 2 Atl. 90 (1886); Wood v. Weimar, 104 U. S. 786, 792, 26 L. Ed. 779 (1881: Michigan law). Accord. Dillon v. Wright, 7 J. J. Marsh. (Ky.) 10 (1831). Contra.

Ownership without either right to possession or possession is insufficient. Wallace v. Brown, 17 Ark. 450 (1856); Amos v. Sinnott, 4 Scam. (Ill.) 440 (1843); Cumberland Co. v. Tilghman, 13 Md. 74, 83 (1859); Collins v. Evans, 15 Pick. (Mass.) 63 (1833); Hess v. Griggs, 43 Mich. 397, 5 N. W. 424 (1880).

Custody is insufficient. Pease v. Ditto, 189 Ill. 456, 59 N. E. 983 (1901); Warren v. Leland, 9 Mass. 265 (1812); Harris v. Smith, 3 Serg. & R. (Pa.) 20 (1817: but possession as agent is sufficient) semble.

[4] Statement of facts abridged and part of opinion omitted.

[5] Shannon v. Shannon, 1 Sch. & Lef. 324 (1804); Mennie v. Blake, 6 E. & B. 842 (1856); Marshall v. Davis, 1 Wend. (N. Y.) 109, 19 Am. Dec. 463 (1828). But to-day either by decisions or statutes replevin lies for a detention. Robinson v. Calloway, 4 Ark. 94 (1842: statute); Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105 (1819: decision); Rogers v. Arnold, 12 Wend. (N. Y.) 30 (1834: statute); Stoughton v. Rappalo, 3 Serg. & R. (Pa.) 559 (1818: deci-

that the action must, therefore, be subject to new rules of pleading, requiring not only the taking to be justified, but the detention also.

An examination of the authorities has brought us to the conclusion that, before the enactment of our statute, the action of replevin would lie for the wrongful detention of the distress, notwithstanding the taking might be rightful; and that the statute has made no substantial change in the law in that respect.

Blackstone says, if I distrain another's cattle damage feasant, and before they are impounded, he tenders me sufficient amends, now although the original taking was lawful, my subsequent detainment of them, after tender of amends, is wrongful, and he shall have an action of replevin against me to recover them; in which he shall recover damages only for the detention, and not for the caption, because the original taking was lawful. 3 Black. Com. 151.

In Evans v. Elliott, 5 A. & E. 142, which was replevin for taking and detaining, &c., the avowry was for rent in arrears, and the plea that, after the taking and before the impounding, the plaintiff tendered the rent and expenses; on special demurrer for that the plea did not go to the taking but only to the detaining, it was held that the plea was good, the tortious detention being a taking.

The following authorities, it is believed, will also sustain us in the conclusion stated: Com. Dig. Replevin C.; Spelman's Glossary, 485; Gilbert on Replevin, 58; Hammond's N. P. 373, 448; Fitzherbert's Natura Brevium, 69 Hale's note a.; 8 Coke, 290; Isley et al. v. Stubbs, 5 Mass. 284; Baker v. Fales, 16 Mass. 147.

Some of the books hold that the action cannot be maintained for an illegal detention merely, except by express provision of the statute, unless the act be such as to make the defendant a trespasser ab initio. And such would appear to be the weight of authority. Pangburn v. Partridge, 7 Johns. (N. Y.) 140, 5 Am. Dec. 250; Cresson v. Stout, 17 Johns. (N. Y.) 116, 8 Am. Dec. 373; Meany v. Head, 1 Mason, 322, Fed. Cas. No. 9,379; Graham's Prac. 55; Story's Pl. 442, note.

But so are not all the authorities. In Massachusetts, the court have said that the action will lie at common law for an illegal detention, independent of their statutory provisions. Isley et al. v. Stubbs, 5 Mass. 284; Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; Portland Bank v. Stubbs, 6 Mass. 427, 4 Am. Dec. 151. And in Baker v. Fales, 16 Mass. 147, the particular point decided was that "replevin lies for a wrongful detention of the plaintiff's goods, although the original taking may have been justifiable." And so also was the decision in Marston v. Baldwin, 17 Mass. 606.

sion). For many citations, showing both the original and the modern rule, see 34 Cyc. 1395.

Even under the original rule it was not necessary that the goods should have been taken as a distress. 34 Cyc. 1353.

Obviously either a taking or detention is necessary. Simpson v. McFarland, 18 Pick. (Mass.) 427, 29 Am. Dec. 602 (1837); Darling v. Tegler, 30 Mich. 54 (1874).

It appears to be admitted in the argument that if the acts of the plaintiff were such as to make him a trespasser ab initio, the avowry is sufficient, replevin being maintainable in such a case, and the plea according to the forms.

Assuming this to be so, and that the action cannot be maintained unless the acts amount to trespass ab initio, still this avowry would seem to be good. According to high authority, any matter showing the distress to have been abused, or the proceedings of the defendant to have been irregular, may be brought out by plea to the avowry. As the detention presupposes and includes a caption, by the forms and rules of pleading a justification of the caption is a justification of the detention, and the new matter, showing the detention to have been illegal, should be set forth in the plea to the avowry. The issue thus becomes narrowed down to the real point in controversy—the irregular or illegal proceedings, or abuse of the distress after the caption. Sackrider v. McDonald, 10 Johns. (N. Y.) 253; Pratt v. Petrie, 2 Johns. (N. Y.) 191; Hopkins v. Hopkins, 10 Johns. (N. Y.) 369.

In Sackrider v. McDonald, 10 Johns. (N. Y.) 253, it was decided that if a party failed to have the damages done by the cattle assessed, according to the requirements of the statute, it was irregular and unlawful, and rendered the party impounding a trespasser ab initio.

Pratt v. Petrie, 2 Johns. (N. Y.) 191, is to the same effect. And in Hopkins v. Hopkins, 10 Johns. (N. Y.) 369, it was held that, in replevin, where the defendant justifies the taking of the beasts as a distress damage feasant, the plaintiff may reply that the avowant, after making the distress, abused it, so as to render him a trespasser ab initio; as if he impounds the cattle after making the distress, without having the damage previously assessed by the fence-viewers, according to the directions of the (New York) act. And he shall recover damages, as in trespass, for the unlawful taking. In the course of the opinion which was delivered by Kent, C. J., it is said that "it is a point assumed in many of the books, and no where denied, that the plaintiff may plead in bar to the avowry that the avowant so abused the distress as to render himself a trespasser from the beginning. There is no reason why the general principle should not apply to this action as well as to trespass, that where a person acts under an authority or license given by law, and abuses it, he shall be deemed a trespasser ab initio."

According to the doctrine of these cases, this plaintiff may plead to the defendant's avowry any matter showing an abuse of the distress, or any unlawful or illegal proceedings by the defendant, after the taking. The defendant may thus be shown to stand in the position of a trespasser ab initio, and so liable, upon this ground, at common law.

There is weight in the suggestion of the plaintiff's counsel, that the defendant must know, and should, therefore, be held to set out the matter on which he relies for a defence of the detention. But when

he justifies the taking of the cattle as damage feasant, his pleading shows him to be in the right, and this is all the law requires of him in the first instance. His rightful caption includes the detention. Replevin cannot be maintained against him unless he had no right to make the distress, or has abused it, or proceeded illegally after making it; and if the plaintiff sees fit to commence this form of action against him, and he justifies the taking, it has been said that the plaintiff, and not the defendant, should be called upon to show why the action was brought; that he ought to know and be required to state, in the course of the pleadings, the ground of bringing his action. But whatever may have been the reason of the rule, the books appear to us to settle it; and being more a matter of practice than one involving any essential principle affecting the rights of the parties, we think we should adhere to the authorities, and that the demurrer should be overruled.[6]

POWELL v. SMITH.

(Supreme Court of Pennsylvania, 1833. 2 Watts, 126.)

Error to the common pleas of Butler county.

Replevin. Andrew Smith, the defendant in error, had recovered in ejectment against the plaintiff in error, John Powell, a tract of land with a merchant mill thereon erected: after judgment, and before the issuing of a habere facias possessionem, Powell severed and removed from the mill the bolting-cloth, meal-chest, mill-spindle, &c. &c.; and this replevin was brought by Smith for those articles. The objections to the plaintiff's recovery were: that the property, if personal, of right belonged to the defendant; and if it belonged to the realty, replevin was not an appropriate form of action.

The court below was of opinion that the property belonged to and passed with the realty, but inasmuch as the defendant had severed it, it was personal so far as regarded him and the right to maintain this action. The plaintiff recovered.

The opinion of the Court was delivered by

GIBSON, C. J. The principle which is to govern this case, was settled in Mather v. Trinity Church, 3 Serg. & R. 509, 8 Am. Dec. 663, Baker v. Howell, 6 Serg. & R. 476, and Brown v. Caldwell, 10 Serg. & R. 114, 13 Am. Dec. 660, in which it was determined, on principle and authority, that the right of property in a chattel, which has become such by severance from the freehold, cannot be determined in a transitory action by a trial of the title to the freehold, because the title to land might otherwise be tried out of the county. An action of trover or replevin for such a chattel therefore does not lie by a plaintiff out of possession. And this is entirely consistent with the admitted

[6] But where replevin in the detinet was brought it was held that such an avowry was bad. Baird v. Porter, 67 Pa. 105 (1871).

principle that a proprietor, in actual possession, may waive the trespass to the freehold, and go for the value of the property taken, because the action is maintainable on evidence of possession alone. Independent of this technical inhibitory principle, which however is decisive, it would provoke much useless litigation, and be attended with great practical mischief, if an owner out of possession were suffered to harass the actual occupant with an action for every blade of grass cut, or bushel of grain grown by him, instead of being compelled to resort to the action for mesne profits, after a recovery in ejectment, by which compensation for the whole injury may be had at one operation. It may be safely affirmed then, that an action like the present cannot be maintained where the plaintiff can make title to the chattel only by making title to the land from which it was severed. But it would seem that actual possession, at the time of the severance, is sufficient evidence of property. Here, however, the property laid in the declaration was taken by the defendant while he was yet in actual possession, though after a recovery of the mill, of which it was essentially a part; and the only thing like a question in the cause is, whether the naked recovery, which preceded the asportation, distinguishes the case from those cited. But nothing is clearer than that such a recovery is not equivalent to an entry even to bar the statute of limitations, and therefore not equivalent to actual possession. The mind is staggered at this conclusion, but unnecessarily, by an apprehension that it would leave the plaintiff without a remedy. He may have remedy by the action for mesne profits, not in the usual form, but by laying the spoliation specially in the declaration. Dewey v. Osborn, 4 Cow. (N. Y.) 329, is the very case; and Goodtitle v. Tombs, 3 Wils. 118, Hylton v. Brown, 2 Wash. C. C. 165, Fed. Cas. No. 6,983, and Lessee of Jackson v. Loomis, 4 Cow. (N. Y.) 172, 15 Am. Dec. 347, are founded essentially on the same principle. Besides, he might have remedy by the writ of estrepement, if not pendente placito under the statute of Gloucester or our own act of assembly, yet certainly at the common law, for waste committed after judgment and before execution, as appears by 2 Inst. 328; in which damages may be recovered commensurate with the injury.

Judgment reversed.[7]

[7] Anderson v. Hapler, 34 Ill. 436, 85 Am. Dec. 318 (1864); Miller v. Wesson, 58 Miss. 831 (1881) semble; Rich v. Baker, 3 Denio (N. Y.) 79 (1846). Accord. McKinnon v. Meston, 104 Mich. 642, 62 N. W. 1014 (1895); P. L. Pa. 1871, p. 268. Contra.

The doctrine of our case has been applied also in trover. Miller v. Wesson, 58 Miss. 831 (1881); National Co. v. Weston, 121 Pa. 485, 15 Atl. 569 (1888: the statute cited in the last paragraph not covering trover). Accord. Rich v. Baker, 3 Denio (N. Y.) 79 (1846) semble. Contra.

The same doctrine has been applied in assumpsit for the price obtained by defendant on a sale of such articles. Miller v. Wesson, 58 Miss. 831 (1881); Brown v. Caldwell, 10 Serg. & R. (Pa.) 114, 13 Am. Dec. 660 (1823) semble.

If the defendant had not disseised the plaintiff but was in mere temporary occupancy of the land the doctrine does not apply. Davis v. Easley, 13

RICHARDSON & SKILTON v. REED et al.

(Supreme Court of Massachusetts, 1855. 4 Gray, 441, 64 Am. Dec. 77.)

Two actions of replevin. The first was of goods attached and held by one of the defendants as deputy sheriff, by direction of the other, on a writ sued out by the latter against Emerson Olmstead.

At the trial in the court of common pleas, there was evidence tending to show that some of the goods were the property of the plaintiff. The defendants contended that the attachment of the goods by the deputy sheriff by direction of the attaching creditor, and holding the same so attached, were not such a taking and holding as would render the creditor jointly liable with the officer in this action.

But Hoar, J., instructed the jury that if the creditor directed the officer to make the attachment on the writ against Olmstead, and the officer, pursuant to this direction, did attach and hold the goods by virtue of the writ, and any of the goods were the property of the plaintiff, this would be such a taking and holding on the part of the creditor as to render him jointly liable with the officer in this action, although the creditor never took or had the goods in his possession. The jury found a verdict for the plaintiff as to some of the goods, and for the defendant as to the residue. The defendants alleged exceptions. * * *

The second action was replevin of a horse attached on a writ sued out by the defendants jointly against Charles S. Wright. At the trial in the court of common pleas, it appeared that the horse was the property of the plaintiff, and was taken as Wright's property by the attaching officer under the direction of one of the defendants, and afterwards remained in the hands of a keeper with whom the officer left it. The defendants contended that the action of replevin should have been brought against the attaching officer, or his keeper, and could not be maintained against the defendants or either of them. And so Briggs, J., ruled pro forma, for the purpose of having this question of law determined. A verdict was taken for the defendants, and the plaintiff alleged exceptions.[8] * * *

METCALF, J. Though an officer who attaches, and a plaintiff who directs him to attach A's goods, on a writ against B, are joint trespassers, and may be sued jointly in an action of trespass or trover, yet they cannot be sued jointly in an action of replevin. The grounds and incidents of a replevin suit are incompatible with the joinder of the creditor and officer as defendants. The writ of replevin assumes that the goods which are to be replevied have been taken, detained

Ill. 192 (1851: but question not raised) not even a semble; Phillips v. Gastrell, 61 Miss. 413 (1883); Brewer v. Fleming, 51 Pa. 102, 115 (1866).

See, further, 1 Chitty, Pleading (13th Am. Ed.) *163; 24 Am. & Eng. Ency. 486.

[8] Argument of counsel omitted.

or attached by the defendant, and are in his possession or under his control; and it directs that they shall be replevied and delivered to the plaintiff, provided he shall give bond conditioned, among other things, to restore and return the same goods to the defendant, and pay him damages, if such shall be the final judgment in the action. But attached goods are in the legal custody and possession of the officer only. The attaching creditor has no property in them, general or special; no right to the possession of them; and no right of action against a third person who may take them from the officer or destroy them. Ladd v. North, 2 Mass. 516. How then can the goods be returned, on a writ of return or reprisal, to him who never had possession of them, nor the right of possession? Or how can he be entitled to damages for the taking and detaining of goods in which he had no property?

The plaintiffs' counsel cited Allen v. Crary, 10 Wend. (N. Y.) 349, 25 Am. Dec. 566, as an authority for sustaining these actions. In that case the plaintiff, whose goods had been taken on an execution against a third person, maintained replevin against the judgment creditor who directed the officer to take the goods. The court proceeded on the ground that, as both the officer and creditor were trespassers, replevin would lie against either of them, because it would lie wherever trespass de bonis asportatis would. And in a subsequent case in the same state, the court maintained an action of replevin against the officer and creditor jointly. Stewart v. Wells, 6 Barb. (N. Y.) 79. But we cannot admit the position that replevin will lie wherever trespass de bonis will. The two actions are not, in all cases, concurrent. By the common law, replevin cannot be maintained where trespass cannot; for, by that law, an unlawful taking of goods is a prerequisite to the maintenance of replevin. 2 Leigh, N. P. 1323; Meany v. Head, 1 Mason, 322, Fed. Cas. No. 9,379; Hopkins v. Hopkins, 10 Johns. (N. Y.) 373. But trespass will lie in cases where replevin will not. Replevin, being an action in which the process is partly in rem, will not lie where it is impracticable or unlawful to execute that part of the process according to the precept. Thus, replevin will not lie against him who takes goods and destroys them, or sells and delivers them to a stranger; yet he might be sued in trespass. So where an officer seized A's property, first on an execution against B, and then on an execution against A, it was held by the court which decided the case of Allen v. Crary, that although A might maintain trespass for the first seizure, yet he could not replevy the property; because he had no right to the possession of it after the last seizure.[9] Sharp v. Whittenhall, 3 Hill (N. Y.) 576. In that case,

[9] Bartlett v. Goodwin, 71 Me. 350 (1880) semble; Cary v. Hewitt, 26 Mich. 228 (1872) semble; Eldridge v. Sherman, 70 Mich. 266, 38 N. W. 255 (1888) semble; Chambers v. Hunt, 18 N. J. Law, 339, 343 (1841) semble. Accord. In Le Flore v. Miller, 64 Miss. 204, 1 South. 99 (1886), it was held that plaintiff must be entitled to the possession at the time when judgment for him is rendered.

and in Brockway v. Burnap, 12 Barb. (N. Y.) 351, the former dicta, that replevin would lie wherever trespass de bonis would, were denied; and in the latter case it was said that in Allen v. Crary the court, by sustaining replevin against a defendant who had not the property in his possession, "pushed out the analogy between trespass de bonis asportatis and replevin further than is warranted by the cases." See, also, Roberts v. Randel, 3 Sandf. (N. Y.) 712, 713.

In our opinion, replevin cannot be maintained, in this commonwealth, against a person who has no possession or control of the goods to be replevied; replevied goods cannot be restored and returned to a person from whom they were never taken; and such person cannot rightfully be made a defendant, sole or joint, in an action of replevin.

Exceptions sustained, in the first case; overruled, in the second.[10]

PHILIPS & WALKER v. HARRISS.

(Court of Appeals of Kentucky, 1829. 3 J. J. Marsh. 122, 19 Am. Dec. 166.)

Judge UNDERWOOD [11] delivered the opinion of the court.

The appellants, as trustees of Mrs. Richardson and her children, instituted an action of replevin against the appellee. Four negroes were the subject of the controversy. Harriss relied upon the following facts, which were set out in two pleas, as his defence, to wit: that two executions were placed in his hands, he being coroner of Anderson county, against the estate of John C. Richardson; that in virtue of said executions, and while they were in full force, he levied on the slaves, in the declaration mentioned, they being in the possession of the said Richardson; that he advertised the slaves for sale, according to law, permitted them to remain with said Richardson, and took his bond, with surety, to have them forth coming, on the day of sale; that he gave the plaintiffs, who claimed the property, ten days previous notice, of the time and place of sale; that in pursuance of the act of assembly, in such cases made and provided, he summoned a jury, to try the right of said slaves; that the jury were

[10] Paul v. Luttrell, 1 Colo. 317 (1871); Carpenter v. Starr, 1 Mackey (D. C.) 417 (1882); Ramsdell v. Buswell, 54 Me. 546 (1867); Herzberg v. Sachse, 60 Md. 426, 433 (1883) semble; Hall v. White, 106 Mass. 599 (1871); Calnan v. Stern, 153 Mass. 413, 26 N. E. 994 (1891); Burt v. Burt, 41 Mich. 82, 1 N. W. 936 (1879); Gildas v. Crosby, 61 Mich. 413, 28 N. W. 153 (1886); Krosmopolski v. Paxton, 58 Miss. 581 (1881) semble; Mitchell v. Roberts, 50 N H. 486 (1871). Accord. Davidson v. King, 15 New Bruns. 526, 32 (1875) Contra.

If defendant parted with the possession wrongfully replevin will still lie against him. Sayward v. Warren, 27 Me. 453 (1847); McBrian v. Morrison, 55 Mich. 351, 21 N. W. 368 (1884). Accord. Ramsdell v. Buswell, 54 Me. 546 (1867). Contra.

[11] Part of the opinion omitted.

empannelled and sworn according to law; and that the claimants, to wit: the plaintiffs, did not succeed in establishing the property to be theirs, the jury not agreeing.

To the facts, thus set forth in the defendant's pleas, the plaintiffs, in substance replied, that they were the owners, in fee, of the slaves in contest, the same having been conveyed to them in trust, for the use of Mrs. Richardson, wife of said John C. Richardson, by Samuel Arbuckle, who was seised at the date of his conveyance, and that, for the purpose of effectuating the terms of the trust, they delivered the slaves, in the declaration mentioned, to said Richardson and wife, to be held by them, as bailees of the plaintiffs, and not in the proper right of the said Richardson, as his own property. To the replications of the plaintiffs, the defendant demurred. The court gave judgment on the demurrer, for the defendant, to reverse which, the plaintiffs have appealed.

It is a principle in pleading, that whatever is well set forth in a plea and not controverted in the replication, is admitted to be true. Thus, all the material facts stated in the pleas, in this case, are admitted; and the plaintiff's attempt to avoid them, by asserting title in themselves, to the slaves. Two questions are made upon the record:

1st. Can the owner of personal property, or a chattel, taken in execution, and who is not a defendant in the execution, maintain the action of replevin for the goods, in the actual possession of the defendant, in the execution, at the time of the levy made on them?

And 2d. Can the officer, levying the execution, exonerate himself from a recovery in an action of replevin, by shewing that he empannelled a jury, to try the right of property; and that the jury failed to decide, that the property belonged to the claimant?

In regard to the first question, we are of opinion, that the defendant in the execution, cannot successfully maintain an action of replevin, against the officer making the levy.[12] The institution of the

[12] Mitchell v. Roberts, 50 N. H. 486 (1871); Hawk v. Lepple, 51 N. J. Law, 208, 17 Atl. 351, 4 L. R. A. 48, 14 Am. St. Rep. 677 (1889); Gardner v. Campbell, 15 Johns. (N. Y.) 401 (1818); Morris v. De Witt, 5 Wend. (N. Y.) 71 (1830); Pott v. Oldwine, 7 Watts (Pa.) 173 (1838); Dearmon v. Blackburn, 1 Sneed (Tenn.) 390, 60 Am. Dec. 160 (1853); Buck v. Colbath, 3 Wall. 341, 18 L. Ed. 257 (1865) semble. Accord. Lovett v. Barkhardt, 44 Pa. 173 (1863); Loop v. Williams, 47 Vt. 407 (1875: common-law rule changed by statute). Contra.

So of goods levied on for taxes. Mt. Carbon Co. v. Andrews, 53 Ill. 176 (1870).

But if the goods levied on are exempt replevin may be sustained. Allen v. Ingram, 39 Fla. 239, 22 South. 651 (1897: statutory in part); Elliott v. Whitmore, 5 Mich. 532 (1858); Ferguson v. Washer, 49 Mich. 390, 13 N. W. 788 (1882) semble. Accord. Hawk v. Lepple, 51 N. J. Law, 208, 17 Atl. 351, 4 L. R. A. 48, 14 Am. St. Rep. 677 (1889). Contra.

If the process under which the goods were seized is void, for lack of jurisdiction or otherwise, replevin may be maintained. Adams v. Hubbard, 30 Mich. 104 (1874); Breckinridge v. Johnson, 57 Miss. 371 (1879); Smith v. Huntington, 3 N. H. 76, 14 Am. Dec. 331 (1824) semble; Hawk v. Lepple, 51

action, by the defendant in the execution, would be a contempt of the authority of the court, rendering the judgment, upon which, the execution issued, and ought to be punished as such. See 1 Chitty, 160, and the authorities there cited.

If a defendant in the execution, after judgment had been legally entered against him, upon a full and fair trial, were tolerated in bringing his action of replevin, and by it, to replevy the goods, taken in execution, there might be no end to the delays, which the defendant might thus create. Justice and the end of the law, would be effectually subdued; for, although, the defendant in the execution, and plaintiff in the action of replevin, would fail upon the trial, and judgment would be rendered in favor of the officer, for the restoration of the goods; yet the action might be again and again renewed, and delays, without end, effected. To prevent such abuses, and such contempts of the authority of courts, to prevent the monstrous absurdity of rendering the remedies, afforded by law, with a view to redress wrongs, the means of defeating the very end to be accomplished; the defendant in an execution, who should thus prevent the action of replevin, might, and ought to be severely punished for contempt.

Although, such should be the rule, in respect to the defendant in the execution, the reasons for it, are not equally strong, in relation to those, whose property may be seised under executions, against others. Indeed, we are of opinion, that the reason entirely fails, where an execution issues against A, and the officer levies on the property of B. It is trespass, on the part of the officer, to seise property not owned by the defendant in the execution; and we perceive no reason, founded on good policy, which should prevent the real owner from maintaining his action of replevin, although some adjudged cases, may be found, which lean against it. Chitty, 160, lays it down in general terms, "that no replevin lies for goods, taken by the sheriff by virtue of the execution, and if any person should pretend to take out a replevin, the court would commit him for a contempt, &c." But no goods can with propriety, be said to be taken by virtue of the execution, unless the goods belong to the defendant in the execution; for an execution against A, is no authority and constitutes no justification for taking the goods of B. Where the goods are taken by virtue of the execution, that is, when the goods of the defendant in the execution, are taken, we admit that it would be a contempt for any person, to pretend to take out a replevin. It would be more aggravated, for the friend of the defendant in the execution, to do it, than for the defendant to do it himself. These doctrines do not em-

N. J. Law, 208, 212, 17 Atl. 351, 4 L. R. A. 48, 14 Am. St. Rep. 677 (1889) semble.

A replevin, improper by the above rules, is a contempt of court. Dominus Rex v. Monkhouse, 2 Strange, 1184 (1743).

brace the case of the goods, of a stranger to the execution and judgment, who, when they are taken in good faith, resorts to the action of replevin, to obtain redress. The case of Thompson v. Button, 14 Johns. (N. Y.) 84; and the case of Kerley v. Hume, 3 T. B. Mon. (Ky.) 182, tolerates the opinion, that a stranger to the execution, may maintain his action of replevin. These cases, also prove, that the action of replevin, is not confined to injuries, resulting from illegal distresses for rent, damage feasant, and the like. That it is a remedy, co-extensive with that of trespass, de bonis asportatis, is established in New York, Pangburn v. Partridge, 7 Johns. 140–143, 5 Am. Dec. 250, and Parkhurst v. Van Cortland, 14 Johns. 17, 7 Am. Dec. 427. See, also, Chitty, 159. We see no reason for restricting the remedy, by action of replevin, to narrower bounds in this state. The doctrines laid down by a majority of the court, in the case of Bouldin v. Alexander, 7 T. B. Mon. (Ky.) 424, and which are well fortified by authority, prove that an action of replevin, is an appropriate remedy, in behalf of all strangers, to an execution, whose property may be seised, by an officer, under color of the process.

Applying the foregoing views to the facts of this case, we find nothing in them, which can lead us to decide, that the appellants were not entitled to maintain their action, merely, because the slaves in controversy, were seised by Harriss, to satisfy the execution against Richardson.[13]

We are also of opinion, that the taking of the slaves from the immediate possession of Richardson, cannot prevent the appellants from maintaining this action, if it be true as they allege, that Richardson was no more than their bailee. The possession of the bailee, is the possession of the bailor. The general property of a chattel, commonly unites with it, the possession in law, although, in fact, the thing may be actually possessed by another; thus, the horse of the farmer is in his possession, in law, although, in fact, his overseer, or apprentice, may be riding or working the horse, in the performance of business, exclusively his. The general property is sufficient to maintain the action as a general rule. Chitty, 158. It is not necessary, (as contended by the appellee's counsel) to maintain the action of replevin, that the taking should be from the plaintiff in action. The taking may be from a feme sole, and after marriage, the husband alone,

[13] Sharp v. Arthurs, 1 Houst. (Del.) 353 (1857); White v. Jones, 38 Ill. 159 (1865); Schneider v. Burke, 86 Ill. App. 160 (1898); Parsley v. Huston, 3 Blackf. (Ind.) 348 (1834); Ilsley v. Stubbs, 5 Mass. 280 (1809: statutory, semble contra at common law); Bruen v. Ogden, 11 N. J. Law, 370, 20 Am. Dec. 593 (1830); Dunham v. Wyckoff, 3 Wend. (N. Y.) 280, 20 Am. Dec. 695 (1829); Mead v. Kilday, 2 Watts (Pa.) 110 (1833). Accord. Goodrich v. Fritz, 4 Ark. 525 (1842); Tyson v. Bowden, 8 Fla. 61, 71 Am. Dec. 101 (1858); Cromwell v. Owings, 7 Har. & J. (Md.) 55 (1826); Bernheimer v. Martin, 66 Miss. 486, 6 South. 326 (1889); Smith v. Huntington, 3 N. H. 76, 14 Am. Dec. 331 (1824); Taylor v. Ellis, 200 Pa. 191, 49 Atl. 946 (1901: under a statute antedating Mead v. Kilday, 2 Watts [Pa.] 110, above). Contra.

may maintain the action. Chitty, 159. It is questionable, whether a mere naked bailment, for safe keeping, gives the bailee such a right, as to enable him, to maintain the action, in case the goods are taken from him. 1 Johns. (N. Y.) 380.

In Cresson and others v. Stout, 17 Johns. (N. Y.) 116, 8 Am. Dec. 373, the plaintiffs were permitted to recover in replevin, although, the goods, were not in their possession, when taken by the sheriff's vendee, who was defendant. If the defendant in the execution, is actually possessed of property as bailee, merely, say a horse, which is loaned to him to ride a few miles, the horse is not subject to the execution. The sheriff must levy at his peril, and is a trespasser, if he take property not liable. In general, the action of replevin, can be maintained, where trespass will lie. Pangburn v. Partridge, 7 Johns. (N. Y.) 142, 5 Am. Dec. 250. In Bouldin v. Alexander, this court intimated, that a bill in chancery, to enjoin a sale of property, illegally seised, by an officer, might be tolerated; but for the remedy afforded by action of replevin. If the action is restricted, so that the remedy cannot extend to all cases of illegal seizures, by officers, there will still remain a class of cases, in which the owner of property, taken in execution, contrary to law, must stand by and see it sold, without power to prevent it; and be driven at last, to his action of detinue and trover, and that possibly, against an insolvent vendee of the officer, in which his remedy would be a mockery.

The answer to be given to the second question or point, will depend on the construction of the act of 1803, concerning the trial of the right of property, taken under execution. 2 Dig. 1047. * * *

Wherefore, the judgment of the circuit court is reversed, and the cause remanded, with instructions, to permit the defendant, to amend his pleas, if he asks leave to do so, and to progress with the cause, in conformity hereto; and if he does not amend, then to render judgment upon the demurrer, in favor of the plaintiffs.

The appellants must recover their costs.[14]

[14] Sharp v. Arthurs, 1 Houst. (Del.) 353 (1857); Chinn v. Russell, 2 Blackf. (Ind.) 172 (1828). Accord. Cromwell v. Owings, 7 Har. & J. (Md.) 55 (1826: but holding replevin will not lie even where taken from possession of third party); Thompson v. Button, 14 Johns. (N. Y.) 84 (1817) semble; Gardner v. Campbell, 15 Johns. (N. Y.) 401 (1818); Judd v. Fox, 9 Cow. (N. Y.) 259 (1828) semble. Contra.

SECTION 2.—NECESSARY ALLEGATIONS

DECLARATION IN REPLEVIN.

(Encyclopedia of Forms. Forms No. 6,939 and No. 17,730.)

State of ———, } ss. ——— Court of ——— County.
——— County. } ——— Term, A. D. 18—.

———, plaintiff in this suit, by ———, his attorney, complains of ———, defendant in this suit, of a plea wherefore he wrongfully took the goods and chattels of the said plaintiff and unlawfully detained the same until, etc. For that the said defendant, on the ——— day of ———, in the year 18—, at No. ———, ——— street in the city of ———, in the county aforesaid, wrongfully took the goods and chattels, to wit: (describing them), of the said plaintiff, of the value of ——— dollars, and unjustly detained the same until, etc.

And also wherefore the defendant unjustly detained the goods and chattels until, etc. For that the said defendant, on the ——— day of ———, in the year 18—, at No. ———, ——— street in the city of ———, in the county aforesaid, the goods and chattels of the said plaintiff, to wit, (describing them), of the value of ——— dollars, wrongfully detained, etc.

But that the said defendant, although often requested, hath refused, and yet refuses, to deliver the said goods and chattels above mentioned to the said plaintiff.

Wherefore the said plaintiff says he is injured and hath sustained damage to the amount of ——— dollars, and therefore he brings his suit, etc. ————————, Plaintiff's Attorney.

BOND v. MITCHELL.

(Supreme Court of New York, 1848. 3 Barb. 304.)

This was an action of replevin. The second count of the declaration was as follows: "And also for that the said defendant afterwards, to wit, on the first day of June, 1846, in the town of Shawangunk, in the county of Ulster aforesaid, took a certain horse, wagon, and harness out of the possession of the plaintiff, and to the possession of which the said plaintiff was and is lawfully entitled, of the value of three hundred dollars, and unjustly detained, &c. &c." The defendant demurred, and stated for cause of demurrer, that the said second count set forth the evidence of facts and matters of law; that it did not appear in said count, except by argument, inference, and the evidence of facts, that the plaintiff had any right, title or interest in or to the goods and chattels in said count mentioned. The plaintiff joined in demurrer.

By the Court, PARKER, J. According to well established precedents, it should have been alleged in the declaration, that the articles replevied were the goods and chattels "of the plaintiff." 2 Chit. Pl. 364. Instead of that, the plaintiff says the goods were taken by the defendant out of his possession, and that he was entitled to the possession of them. It is true, that proof that the defendant took the property out of the plaintiff's possession, would support the allegation that they were the goods and chattels of the plaintiff, (Rogers v. Arnold, 12 Wend. 39;) but the plaintiff is not at liberty to state, in his declaration, the evidence of his title, in place of an averment of title. In this respect the pleading is defective. Prosser v. Woodward, 21 Wend. 205. The plaintiff should have claimed the property to belong to him. The defendant could then have traversed such allegation by pleading property in himself, or in a third person. And the materiality of such an averment is apparent from the fact that a plea of property, in replevin, only puts in issue the plaintiff's allegation of title to the property. Anstice v. Holmes, 3 Denio, 244. Rogers v. Arnold, 12 Wend. 30.

But even if the defect above specified is one of form and not of substance, the defendant may nevertheless avail himself of it, in this case, the demurrer being special. Established precedents are not to be disregarded in pleading, even in a matter of mere form. Anstice v. Holmes, above cited; Titus v. Follet, 2 Hill, 318.

There must be judgment for the defendant on the demurrer, with leave to the plaintiff to amend, on payment of costs.[15]

CARTER v. PIPER.

(Superior Court of New Hampshire, 1876. 57 N. H. 217.)

From Carroll Circuit Court.

Replevin, for a bear claimed by the plaintiffs, and alleged to have been wrongfully taken and detained by the defendant.

The writ is dated November 16, 1874.

The plea was the general issue, and a brief statement setting forth, —1st, that the bear was the property of the defendant; 2d, that it was

[15] Some allegation of plaintiff's right is necessary. Lewis v. Clagett, Smith (N. H.) 187 (1807) semble; Luther v. Arnold, 8 Rich. (S. C.) 24, 62 Am. Dec. 422 (1854) semble.

"Of the plaintiff" is sufficient. Bern v. Mattaire, Cas. t. Hardw. 119 (1735); Pattison v. Adams, 7 Hill (N. Y.) 126, 42 Am. Dec. 59 (1845) semble. An allegation of right to possession is not necessary. Tufts v. Johnson, 29 Ill. App. 112 (1888) semble; Pattison v. Adams, Lalor's Supp. (N. Y.) 426 (1844). A general allegation of ownership suffices in a bill in equity supplementary to replevin. Strickland v. Fitzgerald, 7 Cush. (Mass.) 530 (1851). If the plaintiff prima facie could not have title then a special allegation of the plaintiff's right is necessary. Gentry v. Bargis, 6 Blackf. (Ind.) 261 (1842: plaintiffs were husband and wife). Accord. Bern v. Mattaire, Cas. t. Hardw. 119 (1735: same as last). Contra.

the property of the plaintiffs and the defendant jointly; 3d, that it was the property of the plaintiffs, defendant, and others jointly. * * *

The plaintiffs claimed that they made a demand on the defendant for the bear. At the time of the alleged demand the bear was on the defendant's premises in Albany. The court instructed the jury that if they found that the bear was the exclusive property of the plaintiffs, and that a demand was made by the plaintiffs on the defendant for the bear before suit, they might bring in a verdict for the wrongful detention of the bear.

In answer to a question propounded by the court, the jury found that the bear was the exclusive property of the plaintiffs, and rendered a verdict against the defendant for one dollar damages.

The defendant excepted to the foregoing instruction, and moved to set the verdict aside.

The bear remained on the defendant's premises in Albany in his care after it was conveyed home by the defendant in his wagon, and was there when it was replevied by the plaintiffs.

The defendant went to the hunting-ground with a horse and wagon, a little in advance of the plaintiffs, on the morning of the capture of the bear.

The writ alleged that the place of taking and detention was in Tamworth.

There was no evidence of any tender or payment to the defendant of any sum for the care and custody of the bear by the plaintiffs.

After the plaintiffs rested their case, the defendant, by counsel, moved and argued a motion of nonsuit, which the court overruled, and the defendant excepted.

The plaintiffs and one Bragdon composed one hunting party, and the defendant and his boy and hired man the other party.

The defendant received the bear after the capture into his wagon, and conveyed it to his home in Albany, with the consent of the plaintiffs; but there was evidence tending to show that Piper said he would take the cub, and carry him home for the plaintiffs, and that Carter said he should claim the cub.

The questions arising upon the foregoing case were transferred to the superior court by Rand, J. C. C.

CUSHING, C. J.[16] This is said to be an action brought for the unlawful taking and detaining of the property in dispute. The action, I suppose, might have been brought under the act of 1873, under which it would have been sufficient to allege the unlawful detention of the property. Until that statute was passed, it had always been held that replevin would not lie excepting where there had been an unlawful taking. * * *

It appears that at the trial of this case the plaintiffs had to make out under the general issue the unlawful taking by the defendant, and

[16] Statement of facts abridged and part of opinion omitted.

it is clear that the defendant could not be put upon his defence and called upon to show any justification which he might have had, until the plaintiff had made out his case under the general issue.

It appears from the amended case, that the evidence showed, before the plaintiffs rested their case, that the bear was taken away by the consent of the plaintiffs. This being so, there could be no unlawful taking, which was the matter in issue, and of course a nonsuit should have been ordered. * * *

I see no reason why the declaration and pleadings might not be amended so as to relieve the plaintiff from the impossible proof which is necessary under the present pleadings; but on the pleadings as they stand, it is clear that a nonsuit should have been ordered.

The case being disposed of on the motion for nonsuit, it is not necessary to propound any dicta in regard to the instructions excepted to.

LADD and SMITH, JJ., concurred.

Verdict set aside, and nonsuit ordered.[17]

SECTION 3.—DEFENSES

GENERAL ISSUE IN REPLEVIN FOR A TAKING.

(Encyclopedia of Forms. Forms No. 17,726 and No. 17,759.)

State of ———.

The ——— Court for the county of ———.

State of ———,
County of ———.} ss.

And the said defendant, by ———, his attorney, comes and defends the wrong and injury, when, etc., and says, that he did not take the said goods and chattels (describing them), in the said declaration mentioned, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against him, and of this the said defendant puts himself upon the country, etc.

————, Attorney for Defendant.

[17] Lothrop v. Locke, 59 N. H. 532 (1880). Accord. Riley v. Littlefield, 84 Mich. 22, 26, 47 N. W. 576 (1890: by statute) semble. Contra.

If in replevin for detention the declaration contains an allegation of a taking, that allegation is surplusage and need not be proved. Cullum v. Bevans, 6 Harr. & J. (Md.) 469 (1825) semble; Horsey v. Knowles, 74 Md. 602, 22 Atl. 1104 (1891) semble.

An allegation that the taking was wrongful is necessary. Reynolds v. Lounsbury, 6 Hill (N. Y.) 534 (1844) semble.

For the difference between the detinuit form and the detinet form see Benesch v. Weil, 69 Md. 276, 279, 14 Atl. 666 (1888).

GENERAL ISSUE IN REPLEVIN FOR A DETENTION.

(Encyclopedia of Forms. Forms No. 17,726 and No. 17,760.)

State of ———.

The ——— Court for the county of ———.

State of ———,
County of ———. } ss.

And the said defendant, by ———, his attorney, comes and defends the wrong and injury, when, etc., and says, that he does not detain the said goods and chattels (describing them) in the said declaration mentioned, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against him, and of this the said defendant puts himself upon the country, etc.

————————, Attorney for the Defendant.

SPECIFIC TRAVERSE IN REPLEVIN.

(Encyclopedia of Forms. Forms No. 17,726 and No. 17,762.)

State of ———.

The ——— Court for the county of ———.

State of ———,
County of ———. } ss.

And the said defendant, by ———, his attorney, comes and defends the wrong and injury, when, etc., and says, that the said plaintiff ought not to have or maintain his aforesaid action against him, the said defendant, because he says that the said goods and chattels in the said declaration mentioned, at the said time, when, etc., were the property of the said defendant (or of one ———), and not of the said plaintiff, as by the said declaration is above supposed. And this he, the said defendant, is ready to verify. Wherefore he prays judgment if the plaintiff ought to have or maintain his aforesaid action against him, the said defendant, and for a return of the said goods and chattels, together with his damages and costs in this behalf, according to the form of the statute in such case made and provided, to be adjudged to him, etc.

————————, Attorney for Defendant.

COMBINED AVOWRY AND COGNIZANCE.

(3 Chitty, Pleading [13th Am. Ed.] pp. *1043 and *1047.)

In the the King's Bench, (or "C. P." or "Exchequer.")
——— Term, ——— Will. 4.

C. D. & E. F.] ats. A. B. } And the said C. D. and E. F. by G. H. their attorney, come and defend the wrong and injury, when, &c. and the said C. D. in his own right well avows, and the said E. F. as bailiff of the said C. D. well acknowledges the taking of the said (goods and chattels) in the said declaration mentioned, in the said (dwelling-house) in which, &c. and justly, &c. because they say that the said plaintiff for a long time, to wit, the space of ——— years next before and ending on a certain day, to wit, the ——— day of ——— A. D. ——— and from thence until and at the said time, when &c. held and enjoyed the said dwelling house in which, &c. with the appurtenances, as tenant thereof to the said C. D. by virtue of a certain demise thereof to the said plaintiff theretofore made, at and under a certain yearly rent, to wit, the yearly rent of £———, payable quarterly, on, &c. (stating the days of payment) in every year, by even and equal portions, and because the sum of £——— of the rent aforesaid, for the space of ———, ending as aforesaid, on the said ——— day of ———, in the year aforesaid, and from thence until, and at the said time when, &c. was due and in arrear from the said plaintiff to the said C. D., he the said C. D. well avows, and the said E. F., as bailiff of the said C. D. well acknowledges, the taking of the said goods and chattels in the said dwelling house, in which, &c. and justly, &c. as for and in the name of a distress for the said rent so due and in arrear to the said C. D. as aforesaid, and which still remains due and unpaid. And this they the said defendants are ready to verify; wherefore they pray judgment and a return of the said (goods and chattels) together with their damages, &c., according to the form of the Statute in such case made and provided, to be adjudged to them, &c.

HOPKINS v. BURNEY.

(Supreme Court of Florida, 1848. 2 Fla. 42.)

Error to Duval Circuit Court, where this case was tried before Judge Macrae.

DOUGLAS, Chief Justice,[18] delivered the following:

This is an action of replevin instituted in the Circuit Court of Duval county by Benjamin Hopkins and Solomon Moody against Arthur Burney to recover a certain negro slave named Charles. The

[18] Part of the opinion omitted.

declaration contains but a single count to which a plea of "non cepit modo et forma" was put in, but was on the same day on which it was filed withdrawn by leave of the court for reasons stated in the record, which however are not material to the decision of this case. * * * On the next day, a jury was empanelled and sworn "well and truly to try the issue joined between the parties," who found for the defendant and assessed his damages at one hundred and twenty dollars for the detention of the said negro Charles from the 25th day of November, 1846, until the 18th day of November, 1847, and further that the defendant was entitled to a return of the said negro Charles, upon which verdict judgment was entered for the sum so found, with interest thereon, until paid, and that said plaintiffs return to said defendant the said negro Charles, and that a writ of restitution be awarded, and that said plaintiffs pay to said defendant the costs of these proceedings taxed at twenty-one dollars thirty-two cents. * * *

Whereupon the plaintiffs sued out their writ of error to the said Circuit Court, and have herein assigned the following error, to wit: * * *

Third. The court erred in charging the jury that it was incumbent on the plaintiffs to shew by evidence affirmatively, that the property belonged to them, or that they had such right of possession as could not be lawfully divested by the defendant.

Fourth. The court erred in charging the jury that the plaintiffs must prove that the slave was wrongfully taken. * * *

The third error is deemed to be well assigned. Under the plea of non cepit it was not incumbent on the plaintiffs to prove that the slave Charles belonged to them, and the court should have so charged the jury.[19] The plea admits that fact, and puts in issue only the taking (as alleged in the declaration,) and the detention. Mackinley v. McGregor, 3 Whart. (Pa.) 369, 31 Am. Dec. 522; Buckley and others v. Handy, 2 Miles (Pa.) 449; Galusha v. Butterfield et al., 2 Scam. (Ill.) 227; Seymour v. Billings, 12 Wend. (N. Y.) 286; 1 Stark. Ev. 715; 2 Leigh's Nisi Prius, 1330; Bemus v. Beekman, 3 Wend. (N. Y.) 667; Williams v. Welsh, 5 Wend. (N. Y.) 290. In this last case the plea cepit in alio loco, was put in by the defendant, and the court below decided that the plaintiff must make out his case in the same manner as he would have been required to do, had the plea non cepit been interposed.[20] The plaintiff proved the taking at the place charged in the declaration. The case was carried up, and

[19] Wildman v. Norton, 1 Ventr. 249 (1673); Carroll v. Harris, 19 Ark. 237 (1857) semble; Eaves v. King, 1 Har. (Del.) 141 (1833); Van Namee v. Bradley, 69 Ill. 299 (1873); Vickery v. Sherburne, 20 Me. 34 (1841); Smith v. Snyder, 15 Wend. (N. Y.) 324 (1836); Wiley v. McGrath, 194 Pa. 498, 45 Atl. 331, 75 Am. St. Rep. 709 (1900). Accord.

[20] Non cepit denies the place of taking. Anonymous, 2 Mod. 199 (1676); Johnson v. Wollyer, 1 Str. 507 (1722).

the Supreme Court of New York held that this ruling was right. Chief Justice Savage in delivering the opinion of that court, said, "this plea does not admit the taking as the plaintiff has laid it; it traverses the place and in this action the place is material. The plea denies the taking at the place, but if the plea of non cepit alone be put in and it appear that the defendant had the goods in his custody in the place alleged in the declaration, the plaintiff will be entitled to a verdict on this plea." [21] Leigh's Nisi Prius, 1330; Walter v. Kersop, 2 Wilson, 354, 355. But if the defendant proves the taking in another place, the plaintiff will (according to the rule laid down in 1 Strange, 507) be non suited. As however, our tenth general rule of practice (page 12, pamphlet; rule 13, page 5, annexed to Acts of the General Assembly of 1845) provides that the plaintiff shall in no case be compelled to submit to a nonsuit, the rule here would be different. The plaintiff would have a right to submit the proof to a jury but would not on such proof be entitled to a verdict. The plea of non cepit, admits the property of the thing taken to be in the plaintiffs in the action, and if the defendant means tc dispute the question of property, he must plead it specially. He will not be allowed to dispute the ownership under an issue which only denies the taking. 2 Phil. Ev. 126; 1 Chitty's Pl. 159; Bemus v. Beekman, 3 Wend. (N. Y.) 673.

The fourth error is also well assigned. The slave in controversy (being admitted by the plea of non cepit, to be the property of the plaintiffs, it results as a matter of course, in the absence of all proof to the contrary,) that the taking and carrying away of said slave was wrongful. The taking and carrying away of a personal chattel of another person, to his damage is (prima facie at least) a trespass. 1 Saund. on Pl. and Ev. 84, notes 2, 3; Toller on Executors, 112; Cro. Jac. 362; 2 Bouvier's L. Dict. title "Trespass," 579.

And proof that the property was in possession of the defendant at the place charged in the declaration, is evidence of such taking. Walton v. Kersop, 2 Wilson, 354, 355; Croke Eliz. 869; 1 Saund. on Pl. and Ev. 347, note 1; Bull. N. P. 54; 7 Leigh's Nisi Prius, 1330; Amos v. Sinnott, 4 Scam. (Ill.) 445. (In this last case it was held that a plea of non cepit in replevin for a wrongful detention presents an immaterial issue.) [22]

The case of Moore v. E. Moore, administrator of N. Moore, 4 Mo. 421, is also in point.

[21] Walton v. Kersop, 2 Wils. 354 (1767); Abercrombie v. Parkhurst, 3 B. & P. 480 (1801) semble. Accord.

[22] Walpole v. Smith, 4 Blackf. (Ind.) 304 (1837). Accord. Compare Mackinley v. McGregor, 3 Whart. (Pa.) 369, 398, 31 Am. Dec. 522 (1838).

A plea of not guilty amounts to non detinet. Dyer v. Brown, 71 Ill. App. 317 (1897).

In replevin for a taking non detinet raises no issue. Davis v. Calvert, 17 Ark. 85, 89 (1856).

Under the plea of non cepit in replevin, the court will not permit the defendant to give evidence of special matter in justification.[23] McFarland v. Barker, 1 Mass. 153; 1 Leigh's Nisi Prius, 1330; Dane's Abr. of Amer. Law, 530, § 5; 1 Saund. on Pl. and Ev. 387.
* * *

Upon a full review of this case we are constrained to reverse the judgment and remand the cause to the court below for further proceedings not inconsistent with this opinion.

Per totam curiam.

FERRELL v. HUMPHREY.

(Supreme Court of Ohio, 1843. 12 Ohio, 112.)

This is a writ of error, from Lorain County.

An action of replevin was brought by the Administrators of Nelson Phelps against Willis Ferrell. The defendant plead—

First: Non detinet.

Second: Property in himself.

The parties went to trial, without any replication to the latter plea. The verdict and judgment were for the plaintiffs. This writ of error is now brought to reverse the judgment.

LANE, C. J. As a general rule, it is well settled, that where an issue has not been made up by the parties to a suit, the court can not proceed to judgment (Mason v. Embree, 5 Ohio, 277); and that where a plea, constituting a bar to the action, and requiring a replication, is left unanswered, it is error to dispose of the case, while that plea remains on record, without replication (Headly v. Roby, 6 Ohio, 524). But it is equally well settled, that a judgment will not be reversed for mere irregularity of proceeding, or error in form, where it appears from the record that the party was not prejudiced by such irregularity.

In the action of replevin, under our statute, the jury are bound to inquire into the right of property, and right of possession, of the defendant, in the goods and chattels in controversy, and if they shall find him entitled to either, they shall assess such damages as are right and proper. Swan's St. p. 786.

Both these questions are put in issue by the plea of non detinet, as was decided by this court on application for a writ of error, in the case of Oaks v. Wyatt, 10 Ohio, 344. Now in the case at bar, issue was joined upon that plea. Without deciding, whether the plea of property in the defendant would be good under our statute, it is apparent that it could afford the defendant no advantage that he had

[23] Mt. Carbon Co. v. Andrews, 53 Ill. 176 (1870: that defendant held goods under a tax levy); Barnes v. Tannehill, 7 Blackf. (Ind.) 604 (1846: that defendant took goods as an estray). Accord. Carter v. Piper, 57 N. H. 217 (1876: consent). Contra.

not under the other issue. The precise point was presented to the jury under the plea of non detinet; and if they had found it for the defendant, the verdict must have been in his favor. It is not easy, therefore, to discover how the defendant could have been benefited by a replication to his second plea, or prejudiced by its absence. The judgment must be affirmed.

Judgment affirmed.[24]

HOLLIDAY v. McKINNE.

(Supreme Court of Florida, 1886. 22 Fla. 153.)

Appeal from the Circuit Court for Jackson County.

This was an action in replevin, commenced in January, 1884, in Jackson county, by John H. McKinne, the plaintiff below, against Thomas Holliday, the appellant and defendant, for a lot of corn, fat hogs, a yoke of oxen and two wagons. * * *

Mr. Justice VANVALKENBURGH[25] delivered the opinion of the Court:

The first error alleged is that the court erred in striking out the first, third, fourth and fifth pleas on the plaintiff's motion. The first plea was a disclaimer of possession of the property, and a denial of any interest in the same, except as an heir at law of one E. K. Holliday, deceased, to whose estate the property belonged. The second plea was the general issue. Third, that he held the property claimed as administrator of the estate of E. K. Holliday, deceased. Fourth, general issue as the administrator of such estate. Fifth, that the property was never the property of plaintiff, but was the property of the intestate at his death and was in the hands of defendant as administrator. The statute of this State, (McC.'s Dig. 862, § 12,) in relation to the matter of pleas in such actions, is as follows: "The defendant may plead that he is not guilty of the premises charged against him, and this plea shall put in issue, not only the right of the plaintiff to the possession of the property described in the declaration, but all the wrongful taking and detention thereof." This is the only statutory provision in relation to the plea in such case. Under such plea of the general issue the defendant can give any evidence of special matter which amounts to a defence to the plaintiff's cause of action. The plaintiff, to recover, must show right of possession in himself, and evidence of his want of property or right of possession is admissible under such plea. Under this statute, under the plea of not guilty, the defendant may give evidence of any special matter

[24] Patterson v. Fowler, 22 Ark. 396 (1860; by statute); Noble v. Epperly, 6 Ind. 414 (1855; by statute); Prosser v. Woodward, 21 Wend. (N. Y.) 207 (1839) semble; Emmons v. Dowe, 2 Wis. 322, 354 (1853) semble. Accord. Van Namee v. Bradley, 69 Ill. 299 (1873); Dyer v. Brown, 71 Ill. App. 317 (1897). Contra.

[25] Statement of facts abridged and part of the opinion and the concurring opinion of Mr. Justice Raney are omitted.

which amounts to a defence to the plaintiff's cause of action. In such actions the plaintiff can only recover upon the strength of his own right of possession. Sparks v. Heritage, 45 Ind. 66; Lane v. Sparks, 75 Ind. 278; Yandle v. Crane, 13 Kan. 344; 5 Wait's Actions and Defences, p. 494, § 19; Richardson v. Steele, 9 Neb. 483, 4 N. W. 83; Child v. Child, 13 Wis. 17.

In Loomis v. Foster, 1 Mich. 165, it is said that "the general issue, not guilty, puts in issue every fact stated in the declaration necessary to sustain the plaintiff's action, and not the detention only."

In Gibson v. Mozier, 9 Mo. 256, the court held that "under the plea of not guilty evidence is admissible to show that the plaintiff is not entitled to the possession of the property replevied, and that a deed, under which the property is claimed, is void."

The pleas were properly stricken out. * * *

Judgment reversed and a new trial granted.[26]

LAMOTTE v. WISNER.

(Court of Appeals of Maryland, 1879. 51 Md. 543.)

ROBINSON, J.,[27] delivered the opinion of the Court:

This is an action of replevin brought by the appellee to recover certain cattle found in the possession of the defendant.

The defendant, now appellant, pleaded:

1st. Non cepit.

2nd. Property in George W. Stockdale, as bailiff.

3rd. Property in Benjamin I. Worthington.

4th. That the plaintiff had no property in the cattle.

At the trial the plaintiff proved, that the cattle in question formerly belonged to one Benjamin Worthington; that in May, 1877, they were driven by him from his farm in Baltimore County to the farm of the plaintiff in Carroll County and there sold to him; that after said sale they were taken from the possession of the plaintiff, and put in the possession of the defendant.

The defendant, on the other hand, proved that on the 26th of January, 1877, the cattle were taken under a distress for rent due by the said Benjamin Worthington to Benjamin I. Worthington, that they were left in the possession of the tenant at his request, and upon the faith of an agreement by him to pay the rent on or before the

[26] Clearly this statutory plea puts the plaintiff's title in issue. Miller v. Sleeper, 4 Cush. (Mass.) 369 (1849); Scudder v. Worster, 11 Cush. (Mass.) 573 (1853); Loomis v. Foster, 1 Mich. 166 (1848); Snook v. Davis, 6 Mich. 156 (1858); Bennett v. Holloway, 55 Miss. 211 (1877); Gibson v. Mozier, 9 Mo. 256 (1845) semble; Parham v. Riley, 4 Cold. (Tenn.) 5, 9 (1867) semble.

Apparently in general, matters in excuse are admissible under it. Bennett v. Holloway, 55 Miss. 211 (1877); Gibson v. Mozier, 9 Mo. 256 (1845) semble.

[27] Statement of facts and part of opinion omitted.

first day of May following, and upon his failure to pay at that time, the cattle were to be sold under the distress. Evidence was also offered to show that the plaintiff was not a bona fide purchaser without notice.

There can be no difficulty, we think, in regard to the well settled principles by which the several questions presented by the record are to be determined. At common law the landlord had no right to sell property taken under a distress, but was obliged to keep the same as a pledge until it was redeemed by the tenant. The power to sell was first conferred by Statute 2 William & Mary, and under its provisions, distress soon became a speedy and efficient remedy for the collection of rent. The statute provided that unless the tenant or owner replevied the property within five days after the distress and notice thereof, the person distraining was authorized to have the distress appraised, and after such appraisement to sell the same towards the satisfaction of the rent and expenses incident to the distress.

Now in this case the property was left in the possession of the tenant unsold at his request, and upon his agreement to pay the rent on or before a day named, and as between him and the landlord, it remained subject to the lien acquired under the distress. If, however, the landlord permitted the cattle to remain in the possession of Benjamin Worthington, the tenant, for an unreasonable length of time, without making a sale under the distress, namely, from the 26th of January to the first day of May following, and they were then driven by the tenant from the farm occupied by him to the farm of the appellee, and were there purchased by him, without notice of the distress, we are of opinion that the landlord's lien cannot be enforced to the prejudice of the rights of the appellee as a bona fide purchaser.

On the other hand if the cattle were not sold to the appellee, but merely left in his possession by the tenant, they still remained subject to the lien acquired by the landlord under the distress. The main question, therefore, in this case, is, whether the appellee was a bona fide purchaser without notice.

There was no error however, in the refusal of the defendant's first and second prayers. Replevin may be maintained in this State, not only for the unlawful taking but also for the unlawful detention of property.

And although the cattle may have been taken from the possession of the appellee by a constable of Carroll County, or by other persons and delivered to the possession of the appellant, yet, if the latter refused to deliver them to one who was entitled to the immediate right of possession, an action of replevin would lie. * * *

The thirteenth prayer [28] was erroneous, because it did not submit

[28] The thirteenth instruction prayed by the defendant and refused by the lower court told the jury in substance that if they found that the lease to B. Worthington by B. I. Worthington was made, that rent was due, that B. I. Worthington distrained the cattle, that the cattle were left with B. Worth-

to the jury to find whether the appellee was a bona fide purchaser without notice. With this qualification it presents correctly the law governing and controlling the case. * * *

It is argued in the brief of the appellee, that the appellant's thirteenth prayer was properly refused, because the defendant had no right to set up the distress of the landlord either by way of plea or in evidence.

Now in an action of replevin in this State, the plaintiff must show that he is entitled to the right of possession. The defendant may plead non cepit, property in himself, or in a stranger, inconsistent though these pleas may seem. Edelen v. Thompson, 2 Har. & G. 31. The plaintiff's replication to these pleas must set up property in himself, and on this the issue is joined. Cullum v. Bevans, 6 Har. & J. 469; Warfield v. Walter, 11 Gill & J. 80. And where the defendant pleads property in a third person, the burden of proof is upon the plaintiff to show a superior title to that third person. McKinzie v. B. & O. R. R. Co., 28 Md. 161. Upon these pleas of property the defendant if he succeeds, is entitled to a return of the property without making avowry or cognizance, because they destroy the plaintiff's title. Crosse v. Bilson, 6 Modern, 102; Butcher v. Porter, 1 Salkeld, 94; Alexander's British Statutes, 99.

The defendant having set up title in Benjamin I. Worthington by his third plea, it was competent for him to sustain the plea, or in fact to meet the issue presented by the replication of the plaintiff, by proving how and in what manner Worthington acquired title to the property. * * *

Judgment reversed, and new trial awarded.[29]

QUINCY v. HALL.

(Supreme Court of Massachusetts, 1823. 1 Pick. 357, 11 Am. Dec. 198.)

William A. Quincy replevied goods which had been taken by a deputy of the defendant, sheriff of this county, by virtue of writs of attachment in favor of one Williams and others against A. H. Quincy.

ington subject to the distress and under B. Worthington's agreement to pay the rent by a day stated, that B. Worthington fraudulently removed the cattle from the farm to another county, that the bailiff found the cattle in the possession of the plaintiff and took them, that the bailiff delivered them to the defendant, an innkeeper, for safe-keeping, and that they were at the inn when the replevin issued, then the plaintiff cannot recover.

[29] Anderson v. Dunn, 19 Ark. 650, 655 (1858: statute of limitations); Atkins v. Byrnes, 71 Ill. 326 (1874); Pope v. Jackson, 65 Me. 162 (1876) semble; Whitcher v. Shattuck, 3 Allen (Mass.) 319 (1862); Boswell v. Green, 25 N. J. Law, 390 (1856); Halstead v. Cooper, 12 R. I. 500 (1880). Accord. Smith v. Williamson, 1 Har. & J. (Md.) 147 (1801: statute of limitations). Contra.

The denial of plaintiff's title may be in general terms. Dermott v. Wallach, 1 Black. 96, 17 L. Ed. 50 (1861: District of Columbia law).

The defendant pleaded in bar, that the property was in A. H. Quincy, without that, that the property was in the plaintiff; and upon this traverse issue was joined.

On the trial, before Parker, C. J., the plaintiff produced in evidence bills of sale of the goods from A. H. Quincy, dated on the 24th of June, 1822, which was receipted as paid, and for which the plaintiff gave his promissory notes, payable on demand, without any indorser or other security. The Chief Justice having expressed an opinion that the sale would be found fraudulent as against creditors, it was admitted that the intention was to constitute the plaintiff trustee for the creditors of A. H. Quincy, for the purpose of making an equitable adjustment among all the creditors. It was proved that there had been several meetings of the creditors, at which it was known that the goods were disposed of in the manner and for the purpose above mentioned, and it was proposed to them that the plaintiff should give security and proceed to sell the goods and pay the creditors the amount of his notes, but he was willing to give up the goods and take back his notes, upon receiving 200 dollars for his trouble. A committee of the creditors was chosen, on the 26th of June, to look into the affairs of A. H. Quincy, and they made a report on the 27th, which was shown to the principal creditors and was approved of, or acquiesced in, by all but those who attached. It did not appear that either Downer or Baldwin, who were attaching creditors, were present at any of the meetings of the creditors. The plaintiff was in possession of the property, under the bill of sale, from the 24th of June till the 2d of August, when it was attached.

The Chief Justice directed a nonsuit, with liberty to move to have it taken off and to have a new trial, if an assignment for the purpose and in the form above stated, is good in law.

PARKER, C. J.[30] It is objected first, that under the issue joined the defendant ought not to have been allowed to give evidence which he might have given in case he had set forth his title in an avowry; and that he could not contest the conveyance to the plaintiff on the ground of fraud, because it did not appear in the pleadings that he was a creditor, or that in virtue of his office he was acting for creditors. The pleadings are conformable to the practice in this State for the last thirty years, in cases where replevins have been prosecuted against officers, who had made an attachment of the goods replevied. Before that time, it is believed that the practice of setting forth a special title to the possession of the goods, in the form of an avowry, was more prevalent. As the present practice is convenient, and deprives the plaintiff in replevin of no advantage, he being always presumed to know, where he sues his replevin against an officer, that the goods are attached, we should hesitate much before we overruled it, even

[30] Part of the opinion omitted.

if we could not trace it to any strictly legal source. But we are without doubt that the practice is well founded in law, and is strictly conformable to the principles of good pleading in actions of replevin.

By the common law, property in a stranger may be pleaded in bar or abatement; and the reason is, that the object of the writ is to give the possession of the chattels to him who claims to have the right; if he fail to make out his title, the possession ought to be restored to him from whom by process of law it was taken; and it is wholly immaterial whether the defendant has any title or not, provided the plaintiff has none; for the defendant is entitled to the possession, being answerable for the chattel to the true owner. Nor is it necessary there should be an avowry, in order that there may be a judgment for return; for if it appears that the property is not in the plaintiff, the law will restore the chattel to him who had the possession.[31]

When the writ is abated for some matter of form, it has been held that there shall be no judgment of return, unless there is on the record a suggestion of the defendant's right and a prayer for a return; this is because, though the writ may fail on account of form, the right may nevertheless be in the plaintiff; and the court will have some sufficient reason on record for a change of the possession again before they will order it. But in case of a plea in abatement, that the property is in a stranger, a return will be awarded without any avowry or suggestion, because the finding the issue against the plaintiff proves that he had no right to disturb the possession of the defendant. Salkeld v. Skelton, Cro. Jac. 519. See Presgrave v. Saunders, 1 Salk. 5, (S. C. Ld. Raym. 984,) to the same point; in which the court say, in answer to the objection that property in a stranger can be pleaded only in abatement, "It has been adjudged otherwise, and the law is

[31] Butcher v. Porter, 1 Salk. 94 (1692); Simmons v. Jenkins, 76 Ill. 479 (1875); Lamotte v. Wisner, 51 Md. 543, 561 (1879) semble; Bemus v. Beekman, 3 Wend. (N. Y.) 668, 673 (1829) semble. Accord.

It is not necessary to pray a return. Fleet v. Lockwood, 17 Conn. 233, 238 (1845: statutory, but semble as to common law); King v. Ramsay, 13 Ill. 619, 623 (1852) semble; McArthur v. Lane, 15 Me. 245 (1839); Lowe v. Brigham, 3 Allen (Mass.) 429 (1862).

The mere fact that the defendant obtains a verdict on non cepit does not warrant a return. Hopkins v. Burney, 2 Fla. 42 (1848); Bourk v. Riggs, 38 Ill. 320 (1865); Simpson v. McFarland, 18 Pick. (Mass.) 427, 29 Am. Dec. 602 (1836); People v. Niagara, 4 Wend. (N. Y.) 217 (1830). But if a plea denies both the defendant's wrongful act and the plaintiff's title a return may be awarded. D'Arcy v. Steuer, 179 Mass. 40, 60 N. E. 405 (1901). When non detinet does not put title in issue a return is improper. Bourk v. Riggs, 38 Ill. 320 (1865); Dyer v. Brown, 71 Ill. App. 317 (1897).

If defendant wins on an avowry which admits title in plaintiff but shows a right in defendant to take the possession he is entitled to a return. Larkin v. Wilburn, 2 Blackf. (Ind.) 343 (1830: distress for rent).

The granting of a return or its refusal depends on the right of the defendant to have possession of the property as against the plaintiff at the time of the rendering of judgment. Simpson v. McFarland, 18 Pick. (Mass.) 427, 432, 29 Am. Dec. 602 (1836); Whitwell v. Wells, 24 Pick. (Mass.) 25, 33 (1834); Russell v. Butterfield, 21 Wend. (N. Y.) 300, 304 (1839).

otherwise, for it utterly destroys the plaintiff's action; and whether a defendant or a stranger have the property, it is all one to the plaintiff, since he has it not." The form of pleading, therefore, is correct, and it has been adopted instead of the old mode of pleading by avowry, on account of its simplicity and convenience.

It has been sometimes the practice for the defendant to suggest on the record the facts which entitle him to possession, that he may have a return; but this cannot be necessary where the property is found against the plaintiff, as the above cited cases show. In Gould v. Barnard, 3 Mass. 199, where a writ of replevin was abated because it was not indorsed, the Court refused to award a return, because there was no avowry or suggestion; but this must have been because the writ failed in a point of form, and the defendant being unable to show any right, the Court would not change the actual possession. In a case like the present, where there is a nonsuit upon the merits, the effect must be the same as if the plaintiff had demurred to the plea in bar, or there had been a verdict against the plaintiff upon the issue; in both which cases, as it would legally appear that the plaintiff had no property, a return would be awarded.

The question then is, whether the defendant was properly let in to contest the property of the plaintiff on the ground that the conveyance was fraudulent, it not appearing on the record that he was a creditor, or that he had a lawful right to act for a creditor; or in other words, whether it was necessary for an attaching officer to set forth his authority in an avowry, in order to be entitled to a defence, when the property attached has been taken out of his hands by replevin.

Here again the practice has been general for many years. It is much more usual to try the validity of conveyances under the issue of property in the plaintiff, than in the more complex way of avowry. The latter is seldom resorted to, unless it be to gain some advantage in pleading; and there is no necessity for it; for the plaintiff undertakes to prove the chattels taken to be his property, and must be supposed to come prepared to maintain it against creditors as well as others. If he has taken a conveyance to defeat creditors, he cannot be surprised with evidence tending to show the fact; and the statement of the defendant's official right in a plea cannot be necessary to enable him to be ready to maintain his property. When he proves a conveyance from the debtor, the party contending with him may well show in evidence his right to contest it. If he had brought trespass instead of replevin, it has never been disputed that, on the general issue, a defendant may, by showing that he is a creditor, be let in to contest his title on the ground of fraud; this is done every day, and there is no reason for a different rule in replevin. Indeed, there seems to be no reason why a sheriff, if he is sued, may not plead

property in himself, and prove it by showing his special property under an attachment. * * *

Motion to take off the nonsuit overruled, and judgment for a return.[32]

PAUL v. LUTTRELL.

(Supreme Court of Colorado, 1871. 1 Colo. 317.)

Replevin for a portable saw mill. The evidence tended to show that the plaintiff had possession, that the property was sold under an execution against the Union Mill Company and that the defendant became the purchaser. There was no evidence of any possession by the defendant unless it be assumed that when he bought the goods they were delivered to him by the officer conducting the sale.

WELLS, J.[33] The defendant in error brought replevin against plaintiff in error, and declared in the cepit; defendant in the court below pleaded non detinet and property in himself; issue was joined upon these pleas, and the cause was submitted to a jury, who found for the plaintiff below upon both issues. Upon the trial, the evidence offered by the defendant in support of his plea of property was excluded, and we think properly; there was also evidence of a possession by the plaintiff of the goods in controversy at some time prior to the bringing of his action; the finding of the jury upon the second issue is therefore supported by the evidence.

But we think there is no evidence to support the finding upon the plea of non detinet.

All of the evidence which can, in any way, be applied to this issue is entirely consistent with the supposition, that the defendant derived possession of the goods in controversy (if indeed he ever had possession of them) by a delivery; there was no evidence given of a taking by the defendant, or of a demand and refusal to surrender them, or of equivalent circumstances.

The question is, therefore, presented, whether in this form of action the plea of non detinet presents a material issue.

In this territory replevin lies "whenever any goods or chattels have been wrongfully distrained or otherwise wrongfully taken, or shall be wrongfully detained." According therefore as the plaintiff declares in the cepit or in the detinet, either the taking or the detention is the

[32] Gates v. Gates, 15 Mass. 310 (1818: replevin for taking); Snook v. Davis, 6 Mich. 156 (1858: doubtful whether for taking or detention); Craig v. Grant, 6 Mich. 447, 455 (1859: detention); Oaks v. Wyatt, 10 Ohio, 344 (1840: detention). Accord. In Carroll v. Harris, 19 Ark. 237 (1857: taking and detention), it was held that the defense was inadmissible under non cepit and it was said that it must be pleaded specially.

[33] This short statement is substituted for that in the report and part of the opinion is omitted.

gist of the action; but we think that the plaintiff must establish a detention in either case, if put in issue, for the words of the statute above quoted are manifestly qualified by other words which follow in the same section, whereby it is provided that, in the cases before therein specified, "an action of replevin may be brought for the recovery of such goods and chattels." That is to say, the action of replevin in either form lies, as at common law, only for the recovery of goods in specie; and a mere unlawful taking, not followed by a detention, will not suffice to maintain it. It follows, therefore, that the detention of the goods is a material fact necessary in either form of the action to maintain the plaintiff's case, and may always be put in issue, either by the plea of non detinet, or perhaps by the plea of non cepit, where the plaintiff declares in the cepit, per Rogers, J., in MacKinley v. McGregor, 3 Whart. 398, 31 Am. Dec. 522, or we think by special plea, and when so put in issue the plaintiff may maintain the affirmative by a mere proof of the taking, from which the law presumes that the goods continue in the defendant's possession, and that the defendant remains of the purpose in which he committed the wrong, and intends to retain them, or by proof of demand and refusal before action brought, or by proof of other circumstances warranting the inference that a demand would have been unavailing. Johnson v. Howe, 2 Gilman (Ill.) 342.

The defendant, on the other hand, may maintain the negative of the issue by showing, if he can, that, before suit brought, he restored the goods to the plaintiff's possession, or that the goods were before action brought destroyed by the act of God, or possibly by his own act, for it cannot well be said that one unlawfully detains that which is not in being. * * *

Reversed.[34]

SIMCOKE v. FREDERICK et al.

(Supreme Court of Indiana, 1848. 1 Ind. 54.)

Error to the Whitley Circuit Court.

PERKINS, J.[35] Replevin against the sheriff of Whitley county. * * *

The defendant pleaded, 1. Property in one Job G. Vandewater, absque hoc, that the goods were the property of the plaintiffs; and 2. He avowed the taking of the goods by virtue of a writ of execution

[34] This defense is admissible under non cepit. MacKinley v. McGregor, 3 Whart. (Pa.) 369, 398, 31 Am. Dec. 522 (1838: not clear) semble.

In Braddock Co. v. Pfaudler Co., 106 Fed. 604, 45 C. C. A. 491 (1901: Pennsylvania law), it was held that the fact that the alleged goods were part of certain realty was inadmissible under a plea denying plaintiff's title.

[35] Part of the opinion omitted.

called a fi. fa. in favor of one Benjamin Gardner against said Job G. Vandewater, whose goods he averred those in controversy were. A motion was made to reject this, so called, avowry, which was overruled. It should have been sustained. This nominal avowry amounted to nothing more than a plea of property in Job G. Vandewater, and, as there had already been a plea to that effect pleaded, the one in question should have been rejected on motion. Mann v. Perkins, 4 Blackf. 271. Whether this avowry was substantially defective as a plea of property in a stranger for want of a traverse of property in the plaintiffs, we shall not now inquire. See Prosser v. Woodward, 21 Wend. (N. Y.) 205; Walpole v. Smith, 4 Blackf. 304. The office of an avowry is, not to deny property in the plaintiff, but to set up some legal right in the defendant to take the property in dispute without regard to its ownership, as, that it was subject to distress for rent, damage feasant, &c. The pretended avowry, in this case makes no attempt to show such a right, and, as we have said, amounts, at best, to nothing more than a plea of property in a stranger. Mann v. Perkins, supra; Martin v. Ray, 1 Blackf. 291; Harris v. McFaddin, 2 Blackf. 71; Wright v. Matthews, 2 Blackf. 187; Larkin v. Wilburn, 2 Blackf. 343; Given v. Blann, 3 Blackf. 64. * * *

PER CURIAM. The judgment is reversed—cause remanded, &c.[36]

ENGLISH v. BURNELL & INGHAM.

(Court of Common Bench, 1765. 2 Wils. 258.)

Replevin for taking plaintiff's cattle; avowry that Burnell was seised in fee and in possession of a certain ancient messuage, and that Ingham was tenant and occupier of another ancient messuage, and that Burnell as owner and occupier of the messuage then in his possession, and Ingham as owner and occupier of the messuage then in his possession, and all other occupiers of the said messuages have had time out of mind, and of right ought to have common of pasture in the locus in quo, &c. and avow they took the cattle damage feasant; the plaintiff pleads in bar, and traverses the right of common, and thereupon issue is joined, and a verdict was found for the defendants.

Serjeant Nares, for the plaintiff, moved in arrest of judgment, and objected that the avowry is ill, the prescription of right of common being confined to the occupiers of the messuages, who have but a mere temporary, and not a permanent interest therein. * * *

Burland, Serjeant, contra—In this avowry, one of the defendants avows as owner and occupier of a tenement, and the other as occupier, the issues are found for the defendants; the plaintiff did not take advantage by demurring, as he might have done, therefore he is not

[36] Ball v. Penn, 10 Pa. Super. Ct. 544, 547 (1899) semble. Accord.

entitled to favour. Admitting the argument on the other side, we have sufficiently set forth a title in the avowants; where the plaintiff complains of an injury done to his soil, there the defendant, in his justification, must prescribe in a que estate, because the plaintiff complains of an injury done to his soil, but in trespass for taking goods, it is sufficient for the defendant to say, that he was possessed of the locus in quo, and the goods were damage feasant; so for taking cattle, a justification that the defendant was possessed of a close and entitled to common, and took the cattle damage feasant is good, and there is no difference between a replevin and trespass for taking cattle only; for replevin is only an action for taking the cattle. In easements, &c. it is sufficient to declare upon the possession. If an avowry shews the locus in quo belongs to the plaintiff, it must set forth a que estate, otherwise it need not; and though an avowry is informal, it is cured by verdict, our title is only defective in the setting forth, and so is cured, as in Cro. Eliz. 445.

Hewitt, Serjeant, of the same side with the defendant—There are two questions, 1. Whether the avowry be good. 2. Whether it be aided by the statute after verdict. Here the injury complained of, is only for taking the plaintiff's cattle, no right to the close is set forth; against a wrongdoer it is sufficient to set forth a possession, as in the case of a way, common, &c.; so in all declarations, and an avowry is in the nature of a declaration. 2 Ld. Raym. 923. In actions against wrongdoers, it is enough to shew possession.[37]

Lord Chief Justice. Have you any case to shew that an avowry is considered as a declaration? Do you argue only on principle?

Hewitt, Serjeant—Only on principle. Distress is the first process in this replevin, and the avowry is the declaration. 11 Mod. 219, Harrington v. Bush; Stat. 32 H. 8, c. 30. Here the true gist of the action has been tried, and it appears the plaintiff has been a wrongdoer. Brown v. Bookill, Skin. 115, 213. * * *

Nares, Serjeant, in reply—It seems to be admitted by the last case cited by my brother, that possession is not sufficient in an avowry. I admit that in trespass for taking cattle possession is a good plea, but in replevin it is otherwise, for there the avowant must shew a title in fee, or derive his title from him who has the fee, to entitle him to have a return of the cattle; and the Stat. 11 Geo. 2, c. 19, was made to excuse the avowant from shewing his title in an avowry for a distress for rent. 2 Stra. 847. Though in the case of easements you may declare upon the possession, yet you must prove a prescriptive right at the trial. After a trial, the court will only presume every thing was proved to make good the title pleaded, but not to make a good title.

Chief Justice. Is there any case to shew that possession is sufficient in an avowry? The court took time to consider till the latter

[37] Part of the arguments of counsel omitted.

end of the term, when the Lord Chief Justice delivered the opinion of the court.

Lord Chief Justice. It is objected that the right of common is laid in the occupiers only. The defendant's counsel did not pretend it would be good where it is necessary to set forth a title; for it is now settled law, and the reason in Gateward's Case [6 Rep. 60a] is convincing. The answer given is, that in trespass there is no occasion to set forth a title against a stranger, but the defendant's counsel produced no case to shew that replevin is similar to trespass.

In replevin the avowant must justify, and shew by what authority he distrains; the power of distress is an extraordinary power, and almost the only case wherein a party is his own carver. There are many cases directly in point. Yelv. 148. There is a great difference between replevin and trespass, because the avowant being to have a return of the cattle must shew a title in omnibus; otherwise in trespass, in which the defendant need only plead an excuse. 2 Lutw. 1231, the avowant must alledge what estate he is seised of, therefore this avowry is bad; the question is, whether the verdict will cure it? The distinction is between a title defectively set forth, and a defective title; where a title is defective, the statutes of jeofails do not extend to it, and the jury cannot examine into what was not set forth; the statutes therefore cannot aid it, and per totam curiam, the judgment must be arrested.[38]

[38] Saunders v. Hussey, 2 Lutw. 1231 (1696); Hawkins v. Eccles, 2 B. & P. 359 (1801); Hopkins v. Hopkins, 10 Johns. (N. Y.) 369 (1813). Accord. Gipson v. Bump, 30 Vt. 175 (1858). Contra.

So of an avowry of distress for rent. Silly v. Dally, 1 Ld. Ray. 331 (1697); Bain v. Clark, 10 Johns. 424 (1813). But in several jurisdictions the rule in this application has been changed by statute. Wright v. Mathews, 2 Blackf. 187 (1828); Hill v. Stocking, 6 Hill, 277 (1844); Franciscus v. Reigart, 4 Watts (Pa.) 98, 116 (1835).

In Bliss v. Badger, 36 Vt. 338 (1863), a cognizance set up title in a third party under whom the defendant acted. It was held that a general allegation of the third party's title was sufficient.

PART II

PLEADINGS IN CONTRACT ACTIONS

CHAPTER I

SPECIAL AND GENERAL (INDEBITATUS) ASSUMPSIT

SECTION 1.—SCOPE OF THESE ACTIONS

BOVEY v. CASTLEMAN.

(Court of King's Bench, 1696. Ld. Raym. 69.)

Indebitatus assumpsit. The plaintiff declares that there was an agreement between the defendant and him, that if the duke of Savoy made an incursion into Dauphine within such a time, that then the plaintiff should give the defendant £100. And if the duke did not make the incursion into Dauphine within the time limited, that then the defendant should give to the plaintiff £100. which agreement was reduced into writing and signed by both the parties; and the plaintiff avers, that the duke of Savoy did not make any incursion into Dauphine within the time limited; by which the defendant became indebted to the plaintiff in £100. and being indebted assumed to pay, etc. Upon non assumpsit pleaded, verdict for the plaintiff. And now Mr. Northey moved in arrest of judgment, that there was not any consideration to raise a debt, for no debt can arise between the plaintiff and defendant upon the incursion of the duke. For it is but a wager, for which indebitatus assumpsit will not lie, because there wants a real consideration. But for mutual promises assumpsit may lie, but not indebitatus assumpsit. For indebitatus assumpsit will lie only in cases where debt will lie, but in this case debt cannot lie. Quod fuit concessum per totam curiam. And therefore judgment was given, quod querens nil capiat per billam.[1]

[1] Walker v. Walker, 5 Mod. 13 (1695); Hard's Case, 1 Salk. 23 (1702) semble; Smith v. Airey, 2 Ld. Raym. 1034 (1705). Accord. Eggleton v. Lewin, 3 Lev. 118 (1683) semble, Contra.

MILLER v. WILBUR.

(Supreme Court of Vermont, 1903. 76 Vt. 73, 56 Atl. 280.)

Exceptions from Windham County Court; Tyler, Judge.

Action by Charles C. Miller against Lester Wilbur. Judgment for plaintiff, and defendant excepts. Reversed.

STAFFORD, J. Miller, the plaintiff, sold certain goods to Luther Wilbur, taking a mortgage back to secure a part of the price. Luther Wilbur in turn sold the goods to Lester Wilbur, the defendant, subject to the mortgage; and Lester assumed the mortgage debt as a part of the price, and also promised the plaintiff directly that he would pay, in consideration of which the plaintiff, who might lawfully have taken possession (there being no stipulation to the contrary in the mortgage), forebore to do so for a time, but afterwards, the defendant failing to keep his promise, foreclosed, applied the proceeds, and brought this action for the balance. The declaration is the common counts in assumpsit, accompanied by a specification of the amount of the mortgage notes, less the proceeds of the foreclosure sale. The plea is the general issue. The defendant excepted to all evidence of the foregoing facts upon the ground that it was not admissible under the pleadings, and that is the question here.

The only one of the common counts which could possibly be appropriate is that which declares upon a promise in consideration of goods sold and delivered by the plaintiff to the defendant, and we think it would be a stretch of language and of reason to say that the plaintiff's forbearance to take the goods into his possession constituted a sale and delivery. The plaintiff did sell and deliver to the original mortgagor, and he in turn sold and delivered to the defendant. There was never a novation, the original purchaser was not released by the plaintiff, and the only consideration moving from the plaintiff to the defendant was the temporary forbearance.[2] It was suggested that the case falls within the principle that when a special contract has been fully executed by the plaintiff, leaving nothing to be done except for the defendant to pay money, general assumpsit may be maintained. But that is true only in cases where the service performed under the special contract would raise an implied promise if there were no special promise, not in cases like the present where there would be no contract liability whatever, except for the special promise. Hersey v. Assurance Co., 75 Vt. 441, 56 Atl. 95. We think, therefore, that the exception must be sustained.

Judgment reversed, and cause remanded.[3]

[2] Forbearance has been thought to be a sufficient quid pro quo. Bidwell v. Catton, Hob. 216 (1765); Ames v. Le Rue, Fed. Cas. No. 327 (1840). See, also, Professor Ames' statement in 8 H. L. Rev. 261.

[3] Crifford v. Berry, 11 Mod. 241 (1710). Accord. Ward v. Evans, 2 Ld.

W. F. PARKER & SON v. CLEMON.

(Supreme Court of Vermont, 1908. 80 Vt. 521, 68 Atl. 646.)

Appeal from Rutland County Court; Eleazer L. Waterman, Judge.

Assumpsit by W. F. Parker & Son against R. N. Clemon. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

TYLER, J. Assumpsit with common counts. Plea, general issue. It appeared by an agreed statement of facts that the defendant was manager of a telephone company, and was engaged, with an assistant, in wiring a business block in Fair Haven; that while so engaged the assistant, in the defendant's absence from the room, accidentally overturned a jar of chemical fluid; that the fluid ran out, leaked through the floor into the plaintiff's jewelry store, and injured various articles therein. The defendant was not employed by the telephone company, but was in charge of the work at the request of the son of the owner of the block, and the assistant was also employed by him. When the plaintiff discovered the injury to his goods he sent for the defendant, showed them to him, and informed him that part of them would have to be sent away to be repaired. The defendant then promised the plaintiff that he would pay him the amount of the damage when he ascertained what it was. The plaintiff had the goods repaired, showed the bill therefor to the defendant, who at first agreed to pay it, but afterwards refused to pay it unless the owner of the block would pay one-half, which the latter would not do.

No question was made in the argument other than whether a recovery could be had under any of the common counts. It is clear that the "work and labor performed" upon the goods were for the plaintiff, and not for the defendant, and the same is true in respect to "money laid out and expended." Indeed, all the common counts are founded on express or implied promises to pay money in consideration of antecedent debts.

This case does not fall within either of the first three divisions made in the text-books—indebitatus assumpsit, quantum meruit, or quantum valebat. The plaintiff contends that the count for an account stated will lie; but we think that his demand does not fall within the definition of an account. It was said by Chief Justice Shaw in Whitwell v. Willard, 1 Metc. (Mass.) 216, that the primary idea of account, computatio, is some matter of debt and credit, or demands in the nature of debt and credit between parties; that it implies that one is responsible to another for money or other things, either on the score of contract, or of some fiduciary relation. It is doubtless true, however, that it would be sufficient to come within the definition if the accounts were

Raym. 928 (1704); Tatlock v. Harris, 3 T. R. 174 (1789); Weston v. Barker, 12 Johns. (N. Y.) 276, 7 Am. Dec. 319 (1815). Contra.

See Professor Henning's article in 3 Select Essays in Anglo-American Legal History, 339, that Account and Debt will lie in such a case. Compare the doctrine of Penn v. Flack, post, p. 280.

all on one side, provided the amount were agreed to by the parties. Langdon v. Roane's Adm'r, 6 Ala. 518, 41 Am. Dec. 60, and note.[4] The form adopted by Chitty, and ever since followed, is that "the defendant accounted with the plaintiff of and concerning divers sums of money before then due from the defendant to the plaintiff, and then in arrear and unpaid, and that upon such accounting the defendant was found to be in arrear to the plaintiff in a named sum, and that, being so found in arrear and indebted, the defendant in consideration thereof undertook and faithfully promised," etc., and the allegation of the breach in this, as in the other common counts, is: "Yet the defendant, not regarding his said promises, * * * hath not, although often requested, as yet paid said sum of money," etc. Bouvier defines "account stated" as an agreed balance of account. It was held in Comer v. Way, 107 Ala. 300, 19 South. 966, 54 Am. St. Rep. 93, that an account stated is an account balanced and rendered, with an assent to the balance, express or implied, so that the demand is essentially the same as if a promissory note had been given for the balance. See, also, 2 Enc. Pl. & Pr. 1024.

We also refer to some of the earlier authorities. It is said in 1 Saund. Pl. & Ev. (5th Ed.) page 47, in respect to a recovery upon this count, that it must be proved that the account was "of money or a debt." It is also there said that an account stated does not alter the nature of the original debt. It was held in Knowles v. Mitchell, 13 East, 249, that an admission by the defendant that a certain sum was agreed to be paid to the plaintiff for the sale of standing trees, made after the trees had been felled and taken away by the defendant, would support a count upon an account stated. It was decided in Whitehead v. Howard, 5 Moore, 105, cited in Saunders, that a recovery could not be had upon this count because there was no existing antecedent debt due from the defendant to the plaintiff. Willis v. Jernegan, 2 Atk. 251; Peacock v. Harris, 10 East, 106. If the defendant in the present case was primarily liable to the plaintiff, it was in an action of trespass on the case for a tort. The damages consequent upon the wrongful act were not a proper subject of book account, and were not treated as such by the plaintiff. He paid for the repairs, and took receipted bills for such payments.

The plaintiff relies upon this sentence in the opinion in Powers v. Insurance Co., 68 Vt., on page 396, 35 Atl., on page 333: "It is unnecessary, in order to support this count (account stated), to show the nature of the original debt, or prove the specific items constituting

[4] Jasper Co. v. Lampkin, 162 Ala. 388, 50 South. 337, 24 L. R. A. (N. S.) 1237, 136 Am. St. Rep. 33 (1909) semble. Accord.

You may state an account as to one transaction. Knowles v. Michel, 13 East, 249 (1811); Highmore v. Primrose, 5 M. & S. 65 (1816); Ware v. Dudley, 16 Ala. 742, 746 (1849); Powers v. New England Fire Ins. Co., 68 Vt. 390, 396, 35 Atl. 331 (1896).

An account can be stated only of a past transaction or transactions. Lubbock v. Tribe, 3 M. & W. 607 (1838); 2 Pl. & Pr. 1024.

the account; but it must appear that at the time of the account a certain claim existed, of and concerning which an account was stated." That the court was not considering the right of a party to recover for a tort in an account stated is apparent from the fact that the plaintiff in that case was seeking to recover upon an insurance contract, and an amount that he claimed had been agreed upon.

Bradley v. Phillips, 52 Vt. 517, is distinguishable from the present case. There the parties, being owners of adjoining lands, each had cut logs over the line on the other's land. They settled by an agreement that each should pay the other at specified rates for the logs taken, and the plaintiff had paid the defendant. But the latter, though having taken the property and having promised to pay for it, and having induced the plaintiff to pay for what he had taken, refused to pay the plaintiff. The court held that the question was one purely of contract, that the defendant's agreement was to pay the plaintiff for what logs he had taken, that nothing remained for him to do but pay over the money, and that the plaintiff could recover upon the common counts. The defendant's liability was the same as if he had bought the logs and promised to pay the plaintiff for them. The parties, in legal effect, waived their respective claims for torts, settled their claims, and promised to pay each other the sums agreed upon for the logs each had taken, whereupon each became the other's debtor. In the case before us the defendant did not become the plaintiff's debtor, and, upon the authorities, he cannot recover upon the count for an account stated.

Judgment reversed, and cause remanded.[5]

DAVIS v. SMITH.

(Supreme Judicial Court of Maine, 1887. 79 Me. 351, 10 Atl. 55.)

FOSTER, J.[6] This action, brought upon a contract of indemnity, comes to this court upon a full report of the evidence, with the stipulation that the court is authorized to draw such inferences therefrom as a jury might legally do. It appears that the plaintiff, on January 24, 1871, gave his negotiable promissory note for $209 to Harrison Dorr, guardian of Rosetta Dorr, niece of the defendant, payable on the first day of January, 1874. The defendant had obtained letters of guardianship in an adjoining county in which she resided, and with

[5] Whitehead v. Howard, 5 Moore, 105 (1820); Gould v. Coombs, 1 C. B. 543 (1845) semble; Lemere v. Elliott, 6 Hurl. & N. 656 (1861); Chase v. Chase, 191 Mass. 556, 77 N. E. 115 (1906) semble. Accord. Knowles v. Michel, 13 East, 249 (1811) semble; Ingram v. Shirley, 1 Stark. 185 (1816); Throop v. Sherwood, 9 Ill. 92, 98 (1847); Page v. Babbit, 21 N. H. 389 (1850) semble; Powers v. New England Fire Ins. Co., 68 Vt. 390, 396, 35 Atl. 331 (1896). Contra. See, generally, note in 27 L. R. A. 811.

[6] Parts of the opinion are omitted.

whom Rosetta was at that time living; and, soon after the note became due, represented to the plaintiff that she was the lawful guardian of Rosetta Dorr, and as such was legally authorized to collect said note, whereupon the plaintiff paid the defendant the sum of $231.21, the amount then estimated to be due upon the note. At the same time, and in consideration thereof, the defendant agreed in writing to fully indemnify and save the plaintiff harmless in consequence of his paying the note to her. Suit was afterwards commenced by the indorsee of the note. The case was tried and carried to the full court. Finally, judgment was rendered against this plaintiff for the amount of the note, and interest thereon from date. Dorr v. Davis, 76 Me. 301. After judgment was rendered against him this plaintiff paid the amount of it, together with costs of suit, to the plaintiff in that action, and now seeks to recover the sum thus paid, amounting to $479, from the defendant in this suit. * * *

Nor do we think that the objection of the defendant is tenable, that, there being a written contract of indemnity, the plaintiff must declare specially upon such contract, and will not be allowed to introduce proof in support of his claim under the general count for money paid. The objection is one of form, and does not touch the real merits of the case. Still, if it rests on sound legal principles, it is the duty of the court to give effect to it. It is undoubtedly the general rule of law that, where the parties have made an express contract, the law will not imply one. But this rule is not inflexible, and, like most general rules, is subject to exceptions. Thus it has been held that, where the special contract is not under seal, the plaintiff has his option, under some circumstances, either to declare on the implied promise, or to set out the special contract in his declaration. Tousey v. Preston, 1 Conn. 175. An action for money had and received will lie on a promissory note or bill of exchange, and yet they are express contracts. Pitkin v. Frink, 8 Metc. (Mass.) 12; Henschel v. Mahler, 3 Denio (N. Y.) 428. It is also a reasonable and well-recognized principle of law, settled by numerous decided cases, that where there is an express contract of indemnity, and by its terms it contains nothing more than the law would imply, it is optional with the plaintiff to declare in general indebitatus assumpsit for money paid, or upon the special contract.

This question arose in Gibbs v. Bryant, 1 Pick. (Mass.) 118, where a written promise of indemnity had been given to the plaintiff by the defendant; and, upon objection by the defendant that there was a special agreement which ought to have been declared on, the court say: "This objection cannot avail the defendant because the written contract produced contained nothing more than what the law would imply. The right of action rests upon the payment of money for the use of the defendant. The law raises a promise, and the plaintiff may make use of his written contract or not, as he pleases. If there is anything in the written promise to contradict the implication of law, the defendant may show it." Precisely the same doctrine was laid down

in Sanborn v. Emerson, 12 N. H. 58, where the declaration contained a general count for money paid, laid out, and expended for the use of the defendant. There the plaintiff had receipted for the property of the defendant attached in sundry suits commenced against him, and had the actual custody of it, and at the request of the defendant the plaintiff delivered the property to him; the defendant expressly agreeing that the plaintiff should be indemnified and saved harmless on account of the obligation resting upon him in consequence of his having receipted for the property attached. Judgments were afterwards recovered in the several suits; and the plaintiff, being unable to surrender the property, was compelled to pay the amount of the several judgments. The court there say that the case comes "directly within the principle of the decision in Gibbs v. Bryant; the special contract, as it appears, containing nothing more than the law would imply. On this branch of the case, then, we hold that the action is well maintained, notwithstanding the existence of the special contract of indemnity, and the omission to set it out in the declaration; and the objection that the action should have been brought on the express contract is therefore overruled." The following cases sustain the same principle: Colburn v. Pomeroy, 44 N. H. 23; Rushworth v. Moore, 36 N. H. 195; White v. Leroux, 1 Moody & M. 347, 22 E. C. L. 331; Williamson v. Henley, 6 Bing. 299, 19 E. C. L. 89; Pownal v. Ferrand, 6 Barn. & C. 439, 13 E. C. L. 232, 233; Keyes v. Stone, 5 Mass. 394. The relation of the present parties in reference to the note upon which the indemnity was given, was such as would in law raise an implied duty or obligation of indemnity as strong as where a receiptor, upon request, had delivered up property to the owner against whom suits had been commenced. The defendant in the one case had no right to the property; in the other, no right to the money or note; and the contract of indemnity in both cases contained no more than the law would imply

The plaintiff alleges that he has paid so much money for the use of the defendant. To sustain this allegation it is necessary for him to show that the money was paid at the defendant's request, either express or implied. "The request to pay, and the payment according to it, constitute the debt; and whether the request be direct, as where the party is expressly desired by the defendant to pay, or indirect, where he is placed by him under a liability to pay, and does pay, makes no difference. * * * In every case, therefore, in which there has been a payment of money by the plaintiff to a third party at the request of the defendant, express or implied, on a promise, express or implied, to repay the amount, this form of action is maintainable." Brittain v. Lloyd, 14 Mees. & W. 773. And the doctrine of the courts is that where the plaintiff shows that he, either by compulsion of law, or to relieve himself from liability, has paid money which the defendant ought to have paid, this count will be sustained. 2 Greenl. Ev. § 114; Nichols v. Bucknam, 117 Mass. 491. In such case, said Lord Tenterden, C. J.: "I am of the opinion that he is entitled to recover

upon the general principle that one man who is compelled to pay money which another is bound by law to pay, is entitled to be reimbursed by the latter; and I think that money paid under such circumstances may be considered as money paid to the use of the person who is so bound to pay it." Pownal v. Ferrand, 6 Barn. & C. 439, 13 E. C. L. 231. * * *

Judgment for plaintiff for $479, and interest thereon from the date of the writ.[7]

PETERS, C. J., and WALTON, DANFORTH, EMERY, and HASKELL, JJ., concurred.

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4 LORD & McCRACKEN v. HENDERSON et al.

(Supreme Court of Appeals of West Virginia, 1909. 65 W. Va. 321, 64 S. E. 134.)

Error to Circuit Court, Randolph County.

Action by Lord & McCracken against S. S. Henderson and others. Judgment for plaintiffs, and defendants bring error. Reversed.

MILLER, P.[8] In an action of assumpsit, on the common counts and a special count, with bill of particulars, the plaintiffs obtained a verdict and judgment against defendants for $875. In the special count a contract in writing between plaintiffs and defendants, dated November 7, 1903, was alleged, whereby, in consideration of the prices stipulated to be paid them therefor, the plaintiffs contracted with defendants to pile, peel, properly cure, and load on cars, according to railroad regulations, all the merchantable bark from green hemlock timber standing on lands of the defendants and to be designated by them, and to cut into suitable log lengths all the merchantable saw timber on said land from which bark could be peeled, and to deliver said logs either at convenient places for loading at the railroad of the defendants, or in a dam accessible to defendants' sawmill, and also to cut, trim, and de-

[7] Gibbs v. Bryant, 1 Pick. (Mass.) 118 (1822); Sanborn v. Emerson, 12 N. H. 57 (1841). Accord. Executor of White v. Woodruff, 1 Root (Conn.) 309 (1791). Contra.

When the defendant receives money which, under the terms of a contract with the plaintiff, he is bound to turn over to the plaintiff, the common counts will lie. Farmer v. Russell, 1 B. & P. 296 (1798), semble; Pettibone v. Pettibone, 4 Day (Conn.) 175 (1810); Tousey v. Preston, 1 Conn. 175 (1814); Tuttle v. Mayo, 7 Johns. (N. Y.) 132 (1810); Stoever v. Stoever, 9 Serg. & R. (Pa.) 434 (1823).

In other cases where the question, whether a common-law debt is necessary to maintain indebitatus assumpsit, has arisen, the courts have divided. That it is necessary, see: Clarke v. Webb, 1 C. M. & R. 29 (1834); Lorton v. Agnew, Morris (Iowa) 64 (1840); Miller v. Watson, 4 Wend. (N. Y.) 267, 275 (1830); Hersey v. Northern Assur. Co., 75 Vt. 441, 56 Atl. 95 (1903) semble. That it is not necessary, see: Cigar Union v. Huecker, 123 Ill. App. 336 (1905); Peltier v. Sewall, 12 Wend. (N. Y.) 386 (1834: apparently one ground of decision); Bradley v. Phillips, 52 Vt. 517 (1880); Rowell v. Dunwoodie, 69 Vt. 111, 115, 37 Atl. 227 (1896).

[8] Part of the opinion omitted.

liver at defendants' railroad, at a point suitable for loading same, all spruce pulp wood. The bark was to be paid for at the rate of $3.50 for every cord of 2,000 pounds, the weight to be determined by the tannery weight. The logs were to be scaled by the defendants or a competent agent by the Doyle or Scribner rule before being sawed at defendants' mill, and were to be paid for at the rate of $3.50 per 1,000 feet for spruce and hemlock, and $4 per 1,000 feet for hardwood logs. The pulp wood was to be paid for at the rate of $2 per cord of 128 cubic feet, and according to the measurements which the defendants should receive from the pulp company. In the bill of particulars filed defendants are charged by plaintiffs as follows: To cash charged plaintiffs not received, $1,000; to 350,000 feet spruce and hemlock timber cut and delivered, not accounted for, at $3.50 per 1,000, $1,225; to damage done roads, $500; to damage done plaintiffs by taking timber nearest dam and railroad, $200; to tan bark in woods and at railroad burnt by negligence of defendants, $100.

Early in the trial below plaintiffs, in proof of the first item of their account, endeavored to show by the witness McCracken that in their statement rendered for the month of October, 1903, defendants had shown as the balance due them at that time $6,103.60 and that in the statement for the month of November, 1903, they had brought down this balance as $6,500.98, a difference of $397.38. When plaintiffs' counsel asked the witness whether he could explain why defendants had made this difference against his firm, he answered: "I cannot." The motion by defendants to exclude this question and answer was overruled. Immediately afterwards, however, when plaintiffs' counsel asked the witness to state when he, in fact, began work for the defendants under the contract, and why the written contract bore date of November 7, 1903, the objection by defendants' counsel thereto was sustained. And thereafter, for a time at least, the court limited plaintiffs in their evidence to transactions subsequent to that date. Later, when it began to appear that the evidence thus restricted might show an erroneous condition of the account between the parties, counsel for defendants, on cross-examination of plaintiff McCracken, endeavored to extend the investigation back of that date, and to show that although the contract bore date of November 7, 1903, it, in fact, was a mere reduction to writing of a prior verbal contract under which the plaintiffs had been operating since about April, 1903. But objections thereto by plaintiffs' counsel were sustained. The above ruling of the court on defendants' motion to exclude the question and the answer thereto of the witness McCracken, relating to the difference in the balance shown in the statement of October, and that brought down in the statement of November, 1903, and the subsequent rulings of the court on the several questions propounded said McCracken on cross-examination, are made the subject of defendants' bills of exceptions Nos. 2, 3, 4, and 5, relied on, which will be considered together.

These rulings of the court we think were based on the erroneous

theory that plaintiffs were necessarily limited in their proof to the matters alleged in the special count. The allegations of the special count and the evidence on the trial show a contract fully executed on the part of the plaintiffs, and that nothing remained to be done on the part of the defendants except to pay plaintiffs the balance, if anything, due them, and that the contract no longer remained executory. A special count therefore was unnecessary. The plaintiffs, if entitled to recover anything, were entitled to recover upon the common counts.[9] Railroad Co. v. Lafferty, 2 W. Va. 104; Railroad Co. v. Polly, Woods & Co., 55 Va. 447; Tuttle v. Mayo, 7 Johns. (N. Y.) 132—all cited with approval in Bannister v. Coal & Coke Co., 63 W. Va. 502, 507, 61 S. E. 338. In the latter case we quote from Tuttle v. Mayo, supra, that "where the party declares on a special agreement seeking to recover thereon, but fails altogether, he may recover on a general contract, if the case be such that, supposing there had been no special contract, he might still have recovered." [10] We think, therefore, that the rulings of the court in so limiting the evidence of the parties were erroneous, and that the action of the court below overruling defendants' motion to strike out, set forth in defendants' bill of exceptions No. 2, was right. * * *

Reversed.

[9] Merrill v. Worthington, 155 Ala. 281, 46 South. 477 (1908); Massey v. Greenabaum, 5 Pennewill (Del.) 20, 58 Atl. 804 (1904); Johnson v. Lee Toma Co., 16 Haw. 693 (1905); Evans v. Howell, 211 Ill. 85, 71 N. E. 854 (1904); Rogers v. Brown, 103 Me. 478, 70 Atl. 206 (1908); So. Ass'n v. Price, 88 Md. 155, 41 Atl. 53, 42 L. R. A. 206 (1898); Fish v. Gates, 133 Mass. 441 (1882); Nicol v. Fitch, 115 Mich. 15, 72 N. W. 988, 69 Am. St. Rep. 542 (1897); Risley v. Beaumont, 71 N. J. Law, 372, 59 Atl. 145 (1904); Ladue v. Seymour, 24 Wend. (N. Y.) 60 (1840); Atherton v. Goldsmith, 22 R. I. 376, 48 Atl. 141 (1901); Dermott v. Jones, 2 Wall. 1, 9, 17 L. Ed. 762 (1864). Accord. Numerous other cases accord are collected in 4 Cyc. 328. Occasional cases to the contrary, such as Russell v. So. Britain, 9 Conn. 507, 521 (1833), and Hogan v. Gibson, 12 La. 457 (1838), are probably to be disregarded.

[10] Leeds v. Burrows, 12 East, 1 (1810); Brewer Co. v. Hermann, 88 Ill. App. 285 (1899); Tuttle v. Mayo, 7 Johns. (N. Y.) 132 (1810); Manilla v. Houghton, 154 Mass. 465, 28 N. E. 784 (1891); Ruckman v. Bergholz, 37 N. J. Law, 437 (1874); Barnes v. Gorman, 9 Rich. (S. C.) 297 (1856). Accord. Cooke v. Munstone, 1 B. & P. N. R. 351 (1805) semble; Speake v. Sheppard, 6 Har. & J. (Md.) 81 (1823); Norris v. Durham, 9 Cow. (N. Y.) 151 (1828). Contra. See, also, Morris v. Burton, 4 Har. (Del.) 53 (1843), in which the question was left undecided.

PIERSON v. SPAULDING.

(Supreme Court of Michigan, 1886. 61 Mich. 90, 27 N. W. 865.)

CAMPBELL, C. J. This is an action of assumpsit begun by attachment as upon a special contract, but with a declaration merely on the common counts. A bill of particulars was demanded and filed under the statute, which dates the contract as of June 17, 1885, and is:

To the price and value of a stock of hardware, tinners' tools, and fixtures, sold and delivered by plaintiff to defendant at his request....	$4,500
To interest on the same.....	300
	$4,800

The attachment was sued out immediately after the alleged sale, and levied on the same property. Defendant pleaded the general issue, and also, by notice, that the alleged contract was a written contract, copied in the notice, and that plaintiff did not live up to his own agreement in several particulars set forth. The agreement, dated May 25, 1885, was substantially as follows: Plaintiff was to sell to defendant his stock of hardware, tinners' tools, and stove fixtures in his store at Three Rivers, reserving whatever it should inventory beyond $4,500, which excess plaintiff was to take in hardware. Defendant was to pay $4,500 as follows: $3,000 by conveyance of a specified farm of 63 acres, and the balance in cash,—all to be done when the inventory should be completed. Plaintiff was to have one-fourth of the hay and corn then on the ground, and defendant three-fourths. The inventory was to be made and delivered on June 1, 1885, and deed and payment to be made the same day. Nothing was provided concerning the basis of the inventory, which could only be made, therefore, upon some agreed standard of prices. There was a conflict concerning the fairness of the inventory, and concerning the custody of the goods. The inventory was not completed until several days after it should have been, and several matters of contention appear to have arisen. The defendant refused to perform, and did not convey the land. After the suit was begun, he conveyed it to another person.

In our view, this suit could not be based on the common counts. The contract was a special one, and did not rest on a money price. The fact that the land was to be conveyed for $3,000 of the inventory price does not indicate that the inventory or land were priced at their cash value. The sale was one in part for cash, and in part for a specific thing. A breach of the contract must be measured in damages by the amount of injury done, which would involve an inquiry into the actual and not the nominal value of the land. There were also to be deducted from the land three-fourths of the growing crops. There is no propriety in treating this as a sale on a money basis. The authorities which allow suit under the common counts for what is due on a contract performed on the plaintiff's part confine the recovery to money

due. It does not reach to anything else. Our own decisions cover the case, and therefore we shall not look elsewhere. Special contracts must be sued on specially, if relied on for recovery, with that single exception. Begole v. McKenzie, 26 Mich. 470, and notes; Butterfield v. Seligman, 17 Mich. 95. See, also, 1 Chit. Pl. 298. In order to sustain the action here under the common counts by aid of the special contract, it should have involved a promise to pay money for the goods in default of the land.[11] The contract is the only possible basis of recovery here, and it makes the land the only consideration for the greater part of the goods.

There are some other objections which would be worth considering if this were not fundamental; but we so regard it on this record.

The judgment must be reversed, with costs, and a new trial granted.[12]

The other Justices concurred.

LEEDS v. BURROWS.

(Court of King's Bench, 1810. 12 East, 1.)

This was an action on the case on promises. The first count of the declaration was framed upon a special agreement, and stated that the plaintiff, being possessed of a certain farm, as tenant to T. W. C., on

[11] Whether recovery could then be had on the common counts may be considered in connection with Crockett v. Moore, post, p. 358.

[12] Harris v. Fowle, cited in 1 H. Bl. 287 (1787); Talver v. West, 1 Holt N. P. 178 (1816) semble; Bernard v. Dickins, 22 Ark. 351 (1860); Coursey v. Covington, 5 Har. & J. (Md.) 45 (1820). Accord. Stewart v. Craig, 3 G. Greene (Iowa) 505 (1852). Contra.

Where the payment of money is not even part of what the defendant promised, the common counts will not lie. Canfield v. Gilbert, 4 Esp. 221 (1803); Horn v. Bensusan, 9 C. & P. 709 (1841); Snedicor v. Leachman, 10 Ala. 330 (1846); Hurlock v. Murphy, 2 Houst. (Del.) 550, 556 (1863); Russell v. Gillmore, 54 Ill. 147 (1870); Conner v. Henderson, 15 Mass. 319, 8 Am. Dec. 103 (1818); Hosmer v. Wilson, 7 Mich. 294, 74 Am. Dec. 716 (1859); New Orleans Ry. v. Pressley, 45 Miss. 66 (1871); Mitchell v. Gile, 12 N. H. 390 (1841); Weart v. Hoagland, 22 N. J. Law, 517 (1850); Beardslee v. Richardson, 11 Wend. (N. Y.) 25, 25 Am. Dec. 596 (1833); Weiss v. Mauch Chunk Iron Co., 58 Pa. 295 (1868); Sublett v. McLin, 10 Humph. (Tenn.) 181 (1849); Houston v. McNeer, 40 W. Va. 365, 22 S. E. 80 (1895); King v. Kerr, 3 Pin. (Wis.) 464 (1852).

And a promise to the plaintiff to pay money to a third party will not maintain a common count. Darden v. James, 48 Ala. 33 (1872).

The breach of a promise to deliver the defendant's note, bond, or like for money will not sustain a common count. Massen v. Price, 4 East, 147 (1803); Hunneman v. Grafton, 10 Metc. (Mass.) 454 (1845); Wooddy v. Flournoy, 20 Va. 506 (1820). It may be doubted whether the rule would be changed if the fact were that the note or bond, if it had been given, would be now overdue. Dutton v. Solomonson, 3 B. & P. 582 (1803: doubting); Carson v. Allen, 6 Dana (Ky.) 395 (1838: semble that then indebitatus assumpsit would lie).

There is a little authority that the common counts will lie on a note payable in goods. Payne v. Couch, 1 G. Greene (Iowa) 64, 46 Am. Dec. 497 (1847); Crandal v. Bradley, 7 Wend. (N. Y.) 312 (1831).

which farm he had 70 tons of hay and a spike roll, on the 11th of Oct., 1808, in consideration of the premises, and that the plaintiff, at the defendant's request, would relinquish to him the hay and spike-roll, and leave the same on the farm for his use, the defendant promised to pay the plaintiff so much money as certain referees should appraise and value the goods at. And then the plaintiff averred that he did relinquish the hay and spike-roll to the defendant and left them on the farm for his use; and that the referees valued and appraised the goods, and determined that the defendant should therefore pay to the plaintiff for the same, and for and in consideration of the premises, £184. 4s. The second count was upon a general indebitatus assumpsit for a certain sum for hay and farming utensils sold and delivered by the plaintiff to the defendant. The third count was upon a quantum valebant; and there was also one upon an account stated, together with other common money counts.

It appeared at the trial before Lord C. J. Mansfield in Norfolk, that the plaintiff was the outgoing and the defendant was the incoming tenant of a farm, and that it had been agreed between them that the referees should value the hay and the spike-roll, for which the defendant was to pay, and should also estimate the value of repairs for gates and fences on the farm, which the plaintiff was to make good. That by a memorandum in writing, on an appraisement stamp, [after reciting] that the plaintiff was the outgoing and the defendant the incoming tenant, and that the plaintiff at the time of his quitting had a stack of hay and a spike-roll on the farm, which he sold and agreed to leave to the defendant, and the defendant did purchase and agree to take at such sum of money as they (the referees) should value and appraise the same, stated that they (the referees) having met and examined the hay and spike-roll, and considered their value, did appraise and value the same at £184. 4s. This was signed by the referees, and dated 7th March, 1809; and on the other side of the same paper, was written:

7th March, 1809.

The hay and roll valued at	£184 4 0
To deduct therefrom for repairs of gates and fences	6 16 0
Due to Mr. Leeds	£177 8 0

And this was also signed by the referees. It was thereupon objected that it was part of the agreement that the appraisers should value the repairs of the gates and fences, and that there was a variance between the agreement laid and that proved. This objection was admitted by the Chief Justice; and though the plaintiff's counsel insisted that he was entitled to recover either on the special or the general count, the plaintiff was nonsuited.

GROSE, J., said, that he saw no reason why the plaintiff might not recover on the general count the value of his goods, which had been sold to the defendant and taken possession of by him, deducting the value of the repairs which were to be allowed.

LE BLANC, J. The fallacy consists in not considering the plaintiff's claim as arising for goods sold and delivered to the defendant, as the fact really is, but in assuming that the claim of the one party was in consideration of what was to be done on the part of the other. The plaintiff's claim is founded upon the sale and delivery of hay and a spike-roll to the defendant; and the agreement between them in effect is no more than this, that as the plaintiff was indebted to the defendant for something else, as soon as the amount of the defendant's claim was ascertained, it should be taken in part payment of what was to be paid to the plaintiff for the hay and spike-roll. If it had not been so agreed to be deducted, it would have been a subject of set-off; but being agreed to be taken as part payment, it still leaves a sum due to the plaintiff for goods sold and delivered.

BAYLEY, J. The whole of the plaintiff's demand was for goods sold and delivered; though he is not entitled to recover the full value of his goods, because that would be contrary to his agreement to allow for the value of the repairs in part payment: the balance, therefore, is the only debt; but that is altogether for goods sold and delivered.

Rule absolute.[13]

BUTTERFIELD v. SELIGMAN.

(Supreme Court of Michigan, 1868. 17 Mich. 95.)

Error to Oakland Circuit.

This suit was brought by defendant in error against Butterfield, to recover the sum of $625 and interest thereon, which sum had been paid by said Seligman to said Butterfield, in pursuance of a special written agreement; and for which Butterfield was to convey an interest in certain lands, but which he failed to perform.

The declaration was upon the common counts, and to which a bill of particulars was annexed, setting forth the said agreement, to wit:

"$600.00 Pontiac, February 28, 1865.

"Received of Jacob Seligman, six hundred dollars, in payment of one-third of my undivided one-eighth interest in the following described property: One hundred and sixty acres on Black River, known as the Danfield farm, and one hundred and twenty acres in the town of Lakeport, on Lake Huron. And I agree to give said Jacob Seligman a deed for one-third of my undivided one-eighth (⅛) interest in the above described property, if the title of the same is found to be good. The above property was contracted for on the 16th day of February, 1865, by J. C. Goodsell, J. D. Millis, Leander S. Butterfield, and five others; and in case a good title can not be had of the above named property, I am to return to J. Seligman six hundred and twenty-five dollars. L. S. Butterfield."

[13] Sheldon v. Cox, 3 B. & C. 420 (1824); Holbrook v. Dow, 1 Allen (Mass.) 397 (1861). Accord.

On the trial of the cause, the plaintiff testified that he did, on the 28th day of February, 1865, agree to purchase of said defendant, a certain interest in certain lands in St. Clair County, and paid to said defendant the sum of six hundred and twenty-five dollars, on that day, and took from him a receipt or agreement in writing. The said receipt was then offered in evidence; but the counsel for the defendant objected to the same, on the ground that the evidence was not admissible, under the declaration. The counsel for the plaintiff stated that the plaintiff only sought to recover back the money paid to defendant, and did not seek to claim damages for any breach of the agreement. The court admitted the evidence, subject to objection.

The plaintiff further offered proof tending to show that in July, 1865, and before the commencement of suit, he demanded a deed of the land described in the receipt or agreement; that defendant neglected to give a deed; that he then demanded the money back, and defendant refused to pay it. The plaintiff also offered proof to show that he actually paid six hundred and twenty-five dollars, and the statement of the receipt of six hundred dollars was a mistake. The above evidence was admitted, under objection.[14]

The jury rendered a verdict for the plaintiff.

CAMPBELL, J. Plaintiff below sued upon the common counts, and on the trial was allowed to recover upon proof of a special written agreement, reciting the receipt of $600 as payment for certain lands, which defendant agreed to convey if he could make good title, and if he could not make good title, then he was to return to plaintiff $625.

This was an attempt to recover for the breach of an express contract, and there is no principle which can allow its introduction in evidence for the purpose of recovering what it agrees to pay, and yet permit it to be treated as thrown out of the case after it has served its purpose. If there was any cause of action, it was upon the writing which the parties had seen fit to make the evidence of their contract, and the case does not come within any of the exceptions to the rule requiring such agreements to be declared on specially. The contract was not one where nothing remained to be done except paying the price for some work, or service, or commodity furnished under it. The condition was one sided, and claimed to have been broken, and the sum recoverable was nothing more nor less than stipulated damages.

The action was improperly brought, and the judgment must be reversed and a new trial granted. The other questions become immaterial as the issue stands.[15]

COOLEY, Ch. J., and GRAVES, J., concurred. CHRISTIANCY, J., did not sit.

[14] Statement of facts abridged.

[15] Phippen v. Morehouse, 50 Mich. 537, 15 N. W. 895 (1883) semble. Accord. Sprague v. Morgan, 7 Ala. 952 (1845) semble. Contra.

PELTIER v. SEWALL.

(Supreme Court of New York, 1834. 12 Wend. 386.)

This was an action of assumpsit, tried at New York circuit, in September, 1831, before the Hon. Ogden Edwards, one of the circuit judges.

On the trial of the cause, T. N. Wood, a witness for the plaintiff, testified that in May, 1825, he was ship's husband to the schooner Susan Miller, then lying in the port of New York, bound on a voyage to Havre, in France; and had procured from the plaintiff a freight for the vessel, except to the amount of about 16 bales of cotton, which were required to fill her up. That he applied to the defendant, H. D. Sewall, and his partner, E. B. Sewall (who has since died), who had cotton, to ship it on board his vessel; and after some negotiation, it was agreed that the plaintiff should advance to the Messrs. Sewall the price or value of the cotton, at the rate of thirty-one hundredths per pound: that the Messrs. Sewall should retain an interest of one half in the cotton, witness on account of his owners should take one fourth, and the plaintiff the remaining fourth: and that the cotton should be consigned to Peltier and brothers, at Havre, the correspondents of the plaintiff, for sale, and returns to be made to the plaintiff. The plaintiff accordingly advanced to the Messrs. Sewall the whole value of the cotton at the above price, amounting to $1,863.88. The cotton was shipped, the bill of lading and invoice stating the interests of the several parties; the vessel sailed, and the cotton was received by the consignees at Havre, who sold the same, and in September, 1824, transmitted the returns and an account of sales to the plaintiff, exhibiting a loss upon the advance made by the plaintiff. The proportion of the loss falling upon the Messrs. Sewall, was $368.75, which they refused to pay, and the plaintiff brought this suit, declaring upon the common counts only. The account of sales proved to have been rendered by the consignees was read to the jury, although objected to by the defendant. The defendant moved that the plaintiff be nonsuited, on the ground that he should have declared specially on the contract made between the parties; which motion the judge overruled. The defendant then proved that three or four bales of cotton were carried on the deck of the vessel, and that shortly after she sailed, he and his partner expressed their dissatisfaction, and determination to have nothing further to do with the cotton; but it was shown on the other side that the plaintiff had nothing to do with the loading of the vessel. The jury found a verdict for the plaintiff for $520.73, which the defendant now moves to set aside.

SUTHERLAND, J.[16] The principal question in this case is, whether the plaintiff can recover under the common money counts. The

[16] Part of the opinion omitted.

original contract between the parties was special, and the defendant contends ought to have been declared on; and such appears to have been the opinion of this court when the case was formerly before it (3 Wend. 269). The distinction between an executed and an executory contract, does not appear to have been on that occasion sufficiently considered. As long as a special contract remains in force, neither performed nor rescinded, no recovery can be had under the general counts for any service performed under it; the action must be upon the contract itself (Clark v. Smith, 14 Johns. 326; Wood v. Edwards, 19 Johns. 205). But where the contract has been fully performed, and nothing remains to be done but the payment of money, the common counts are all that it is necessary to insert in the declaration; the special agreement need not be noticed in the pleading. So also, if the special agreement has been abandoned by the defendant, or the plaintiff has been prevented from performing it by the act of the defendant, or has performed it substantially, but not in strict conformity with the agreement, he may recover under the common counts for the labor or services actually rendered. Innumerable cases might be cited in support of these positions. Bull. N. P. 139, 140; Cooke v. Munsline, 4 Bos. & Pull. 354; Tuttle v. Mayo, 7 Johns. 132; Linningdale v. Livingston, 10 Johns. 36; Raymond v. Bearnard, 12 Johns. 274, 7 Am. Dec. 317; Wilt v. Ogden, 13 Johns. 56; Jennings v. Camp, 13 Johns. 94, 7 Am. Dec. 367; Ketchum v. Evertson, 13 Johns. 359, 7 Am. Dec. 384; Clark v. Smith, 14 Johns. 326; Champlin v. Butler, 18 Johns. 169; Richardson v. Smith, 8 Johns. 439; Jewell v. Schroeppel, 4 Cow. 564; 2 Saund. 350, note 2; Str. 648; 2 T. R. 105; 6 Taunt. 322; 1 Holt, 236; 3 Com. Law R. 85; 2 Phil. Ev. 83, note a. The supreme court of the United States, in Bank of Columbia v. Patterson's Adm'r, 7 Cranch, 303, 3 L. Ed. 351, say: "We take it to be incontrovertibly settled that indebitatus assumpsit will lie to recover the stipulated price due on a special contract not under seal, where the contract has been completely executed, and that it is not in such case necessary to declare upon the special agreement." The case of Hesketh v. Blanchard and Another, Executors of Robertson, 4 East, 144, strongly resembles in its circumstances the case at bar, and shows conclusively that the general counts are sufficient in a case like this. The marginal note, which states the case correctly, is as follows: A. having neither money nor credit, offers to B. that if he will order with him certain goods to be shipped upon an adventure, if any profit should arise from them, B. should have half for his trouble. B. having lent his credit on this contract, and ordered the goods on their joint account, which were furnished accordingly, and afterwards paid for by B. alone, it was held that B. was entitled to recover back such payment in assumpsit against A., who had failed to account to him for the profits. It was also held, that, as between themselves, such

contract did not constitute them partners—having a bearing in this respect also upon another point in this case. The declaration here contained nothing but the general counts, and no objection appears to have been raised to it on that ground. It was conceded to be sufficient. The principal contract was considered as abandoned or rescinded by the defendant, leaving him liable to the plaintiff as for goods sold and delivered to him. Here the special agreement, instead of being abandoned or rescinded, has been fully performed in all its parts, according to the original contemplation of the parties. The cotton has been sent to the port, and consigned to the house agreed upon; it has been sold according to order, and an account of sales returned to the plaintiff, showing a loss upon the defendant's interest in the adventure of 360 odd dollars. Nothing remains to be done but the payment of this balance.

The action may be considered as either brought for this balance, or for the original advance made by the plaintiff to the defendant for his share of the cotton, and which advance was to be repaid at the termination and close of the adventure. In either point of view, I think the common counts, upon the principles and authorities referred to, are all that the plaintiff's case required.

This was not a partnership transaction, as between the plaintiff and defendant; however it might be as between them and third persons. It was a mode agreed upon, by which the defendant sold absolutely to the plaintiff one half of his cotton, and obtained an advance from him to the full value of the other half. The cotton was to be consigned by the plaintiff to his correspondents at Havre, to be disposed of by them, and the proceeds to be remitted to the plaintiff, out of the defendant's share of which the plaintiff was to pay himself for his advances, if it proved sufficient. It was a special mode of payment agreed upon between the parties. Each of the parties had his own particular views and expectations of advantage from the arrangement. But I am persuaded it would be doing great violence to their intention, to hold them to have been partners in the transaction, and to attach to it all the consequences of that relation. The case of Hesketh v. Blanchard, 4 East, 144, already referred to, has a strong bearing on this point; vide also Venning v. Leckie, 13 East, 6. * * *

New trial denied.[17]

[17] Masters v. Marriott, 3 Lev. 363 (1694); Edwards v. Holding, 5 Taunt. 815 (1814: point not raised); Hopper v. Eiland, 21 Ala. 714 (1852) semble; Farson v. Hutchins, 62 Ill. App. 439 (1896); Leach v. Alphons Custodis Chimney Const. Co., 110 Ill. App. 338 (1903); Phippen v. Morehouse, 50 Mich. 537, 15 N. W. 895 (1883); White v. Taylor, 113 Mich. 543, 71 N. W. 871 (1897). Accord.

EXPANDED METAL FIREPROOFING CO. v. BOYCE.

(Supreme Court of Illinois, 1908. 233 Ill. 284, 84 N. E. 275.)

Appeal from Branch Appellate Court, First District, on Appeal from Circuit Court, Cook County; Charles A. Bishop, Judge.

Action by the Expanded Metal Fireproofing Company against W. D. Boyce. From a judgment of the Appellate Court affirming a judgment for the plaintiff, defendant appeals. Reversed.

This is an action in assumpsit brought by appellee in the circuit court of Cook county, against appellant, to recover for work and labor performed and materials furnished in and about the construction of certain expanded metal and concrete floors and roofs in a paper mill of appellant at Marseilles, Ill., in 1902, and for the use and hire of a certain engine and mixer. The case was tried on a declaration consisting only of the common counts, to which the general issue was pleaded. On the trial the jury found the issues for the plaintiff, and assessed its damages at $4,418.75, and also returned special findings that the work was done in a good and workmanlike manner and the materials furnished were in accordance with the provisions of the contract. The plaintiff remitted the sum of $111.27, and judgment was entered for $4,307.48. On appeal to the Appellate Court the judgment was affirmed, and the case is brought here for review.

The written contract upon which this action was based is dated January 18, 1902. Drawings and specifications for the work were made a part by reference. Article 1 of the contract provided that "the contractor, under the direction and to the satisfaction of N. F. Ambursen, architect, acting for the purposes of this contract as agent of the said owner, shall and will provide all materials and perform all the work mentioned in the specifications and shown on the drawings prepared by the said architect," etc. Article 3 provided that no alterations should be made in the work as shown in the drawings and specifications, except upon the written order of the architect, "and when so made the value of the work added or omitted shall be computed by the architects, and the amount so ascertained shall be added or deducted from the contract price," with the further provision that if there was dissent to the architect's finding the question might be left to three disinterested arbitrators to decide. Article 4 provided that if the architect found fault with the work and gave a written notice the contractor should remedy the defects. Article 9 provided that the payments should be made to the contractor for 85 per cent. of the contract price as the work progressed, and final payment be made within 30 days after the contract was fulfilled; that "all payments shall be made upon the written certificate of the architects to the effect that such payments have become due," with the added provision that the owner might retain out of such payments sufficient to indemnify

himself against liens or claims against the contractor. Article 10 provided "that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials." The contract price of the work was $8,600.

CARTER, J. (after stating the facts as above).[18] On the trial of the case in the circuit court a certificate signed by architect Ambursen was offered in evidence by appellee. There is evidence in the record tending to show that the architect had little, if anything, to do with the work in question during its progress, and it is claimed by appellee that the architect had been discharged by the appellant before the work was performed, but we find no positive evidence in the record of this latter fact. At the time the certificate was obtained it appears that the architect was residing in Watertown, N. Y., and arrangements were made with him by appellee to come out to Marseilles, examine the work, and give his certificate. Under the evidence relating to the securing of this certificate the trial court excluded it, and the Appellate Court held that ruling proper. It is earnestly contended by appellee in this court that both the trial and appellate courts erred in this regard. As appellee has not assigned cross-errors, the error, if any, in this regard cannot be raised in this court.

Manifestly, appellee was bound to procure the certificate of the architect showing the performance of the work as provided in the contract and the amount due under it, or show an excuse for not so doing. The chief contention is that, after this certificate was excluded, the court erred in permitting appellee to prove, under the common counts, that there had been substantial compliance with the provisions of the contract as to carrying out the contract and completing the work. We held in Hart v. Carsley Manf. Co., 221 Ill. 444, 77 N. E. 897, 112 Am. St. Rep. 189, that if the architect's certificate in a building contract has not been obtained as therein required, showing the amount due, a recovery cannot be had upon the common counts; that a recovery must be had on the declaration, setting up the contract, the performance as to furnishing materials and doing the work, and stating the reason why the certificate had not been obtained. In City of Peoria v. Construction Co., 169 Ill. 36, 48 N. E. 435, we held that "when work is done under a contract, * * * plaintiff can only recover therefor when he has fully or substantially performed the conditions precedent to his right of recovery as stated in the contract, or else averred and proved a sufficient excuse for his noncompliance with its conditions." In Chitty on Pleadings (volume 1, 14th Am. Ed., star page 325) it is stated that, "where the matter to be performed is a condition precedent, the performance of that mat-

[18] Part of the opinion is omitted.

ter must be shown, although a third person was to do the act and he unreasonably refuse his concurrence." The same author in the same volume (star page 326) lays down the rule that, in averring an excuse for nonperformance, plaintiff must state his readiness to perform the act and the particular circumstances which constitute such excuse; that, in stating an excuse for nonperformance of a condition precedent, plaintiff must, in general, show that the defendant either prevented the performance or rendered it unnecessary by his neglect or by discharging the plaintiff from performance.

In all cases where, under the contract, something is to be done by the plaintiff or some other person, precedent to performance by the defendant, the plaintiff must allege performance of such condition precedent or show some excuse for the nonperformance. 2 Ency. of Pl. & Pr. p. 999, and cases cited; Gould's Pl. (5th Ed.) p. 67. When a building contract provides for an architect's certificate, such provision is a condition precedent to a right of recovery, and the excuse for the nonproduction of such certificate must be alleged and proved. 4 Ency. of Pl. & Pr. 643, and cases there cited.

It has been frequently held by this court that where a contract has been performed, and it only remains for the contract price for labor or property to be paid, plaintiff may sue and recover under the common counts, and the special agreement may be read in evidence for the purpose of showing its terms to recover damages. Concord Apartment House Co. v. O'Brien, 228 Ill. 360, 81 N. E. 1038; City of Chicago v. Chicago & Northwestern Railway Co., 186 Ill. 300, 57 N. E. 795; Parmly v. Farrar, 169 Ill. 606, 48 N. E. 693. It is therefore insisted by appellee that, as the evidence showed that the architect's certificate was waived by the parties, recovery could be had under the common counts without an averment in the declaration of the waiver, if the evidence also showed that the contract was performed and nothing remained to be done but to pay the amount due—citing, in support of this contention, Foster v. McKeown, 192 Ill. 339, 61 N. E. 514; Evans v. Howell, 211 Ill. 85, 71 N. E. 854; Chicago & Eastern Illinois Railroad Co. v. Moran, 187 Ill. 316, 58 N. E. 335; Shepard v. Mills, 173 Ill. 223, 50 N. E. 709; Keeler v. Herr, 157 Ill. 57, 41 N. E. 750; Continental Life Ins. Co. v. Rogers, 119 Ill. 474, 10 N. E. 242, 59 Am. Rep. 810; German Fire Ins. Co. v. Grunert, 112 Ill. 68, 1 N. E. 113. An examination of these cases will show that in the majority of them the question of proving a waiver under the common counts without specially pleading it was not an issue. In some of them the rule is laid down that, when a contract has been performed and nothing remains to be done but to pay the amount, recovery could be had under the common counts, and, while there are some general statements in certain of these decisions that tend to unhold the contention of appellee on this question, Foster v. McKeown, supra, is the only one which holds that, when a building contract has been substantially performed, an excuse for failure to procure, as required,

the architect's certificate, may be shown under the common counts. We refused to follow this case as an authority on this question in Hart v. Carsley Manf. Co., supra, stating that it was not in accord with the weight of authority.

Counsel for appellee in this case insist that there is a distinction between waiver and excuse; that an excuse for nonperformance is one-sided, while a waiver is two-sided and must be participated in by both parties. It is very clear from the authorities heretofore cited that this distinction is not valid. In the Encyclopedia of Pleading & Practice (volume 4, p. 631) it is stated, in discussing this subject, that if the plaintiff intends to rely on facts which show a waiver of performance by the defendant he must plead such facts; that he cannot plead performance and recover under proof of waiver of performance. See, also, page 644 of same volume, and authorities cited.

We think it is clear, by the great weight of authority in this and other jurisdictions, that, if the architect's certificate is not obtained, recovery can only be had on a declaration setting up the contract and stating the reason for failure to comply with the condition precedent requiring the furnishing of an architect's certificate. Moreover, we are of the opinion that there is no proof in this record that would justify the conclusion that appellant had waived the procuring of the architect's certificate in question. It is claimed that this was waived because partial payments were made from time to time, under said article 9 of the contract, without the architect's certificate, as required thereby. It is not claimed, however, that more than 85 per cent. was paid, and so far as we can find there is nothing in the record to indicate that the provision of article 10 as to the final certificate was waived in any manner by the appellant. This being true, under none of the authorities cited would appellee be permitted to make proof under the common counts that the contract had been substantially performed. * * *

For the errors indicated in permitting the introduction of the proof in question under the common counts, the judgments of the circuit court and Appellate Court will be reversed, and the cause will be remanded to the circuit court for further proceedings consistent with the views herein expressed.

Reversed and remanded.[19]

[19] City v. Construction Co., 169 Ill. 36, 48 N. E. 435 (1897); Parmly v. Farrar, 169 Ill. 606, 48 N. E. 693 (1897); Carson v. Allen, 6 Dana (Ky.) 395 (1838). Accord. Mertens v. Adcock, 4 Esp. 251 (1803); Fowler v. Deakman, 84 Ill. 130 (1876); Foster v. McKeown, 192 Ill. 345, 61 N. E. 514 (1901); Rubens v. Hill, 213 Ill. 523, 536, 72 N. E. 1127 (1904) semble; Zapel v. Ennis, 104 Ill. App. 175 (1902); Snow v. Ware, 13 Metc. (Mass.) 42 (1847); Crane Co. v. Clark, 80 Fed. 705, 26 C. C. A. 100 (1897); Columbus Co. v. Burke, 88 Fed. 630, 32 C. C. A. 67 (1898) semble. Contra.

In the following cases, thus differing from those in the preceding paragraph, the excuse for breach of the condition was prevention by the defendant. It was held that the common counts would not suffice in: Hulle v.

KNIGHT v. NEW ENGLAND WORSTED CO.

(Supreme Judicial Court of Massachusetts, 1848. 2 Cush. 271.)

In an action of indebitatus assumpsit, for goods sold and delivered, the plaintiff introduced in evidence a written memorandum, signed by the defendants, from which it appeared, that the defendants were to take the plaintiff's leasehold premises and machinery, at a certain stipulated rent, and upon other terms stated in the memorandum, and the stock therein, consisting of unfinished carpets, yarn, etc., at certain stipulated prices; that the plaintiff should not, during the time of the lease, engage directly or indirectly in the manufacture of any such carpeting as he was then engaged in making; that the defendants should take possession on the 1st of March; and that all carpets in the looms should be taken at the estimate for yarns, adding for scouring, coloring and weaving. The plaintiff also introduced parol evidence to show, that he had mills where he manufactured carpets, and the defendants had mills near his, where they manufactured yarns; that on the 1st of March, 1847, and the following days, two persons on the part of the plaintiff, and two on the part of the defendants, were em-

Heightman, 2 East, 145 (1802); Jonas v. King, 81 Ala. 285, 1 South. 591 (1886); Hurlock v. Murphy, 2 Houst. (Del.) 550 (1863); Parmly v. Farrar, 169 Ill. 606, 48 N. E. 693 (1897); Watkins v. Hodges, 6 Har. & J. (Md.) 38 (1823); Consolidation Co. v. Shannon, 34 Md. 144 (1871); Beecher v. Pettee, 40 Mich. 181 (1879). Contra are: Studdy v. Sanders, 5 B. & C. 628 (1826); Rohde v. Thwaites, 6 B. & C. 388 (1827); Planche v. Colburn, 8 Bing. 14 (1831); Hall v. Cannon, 4 Har. (Del.) 360 (1846); Rubens v. Hill, 213 Ill. 523, 537, 72 N. E. 1127 (1904) semble; Myer v. Frenkil, 113 Md. 36, 45, 77 Atl. 369 (1910) semble; Moulton v. Trask, 9 Metc. (Mass.) 577 (1845); Hosmer v. Wilson, 7 Mich. 294, 300, 74 Am. Dec. 716 (1859) semble; Mooney v. York Iron Co., 82 Mich. 263, 46 N. W. 376 (1890); Clark v. Fairchild, 22 Wend. (N. Y.) 576, 581 (1840); Stoll v. Ryan, 3 Brev. (S. C.) 238 (1812) semble; Perkins v. Hart, 11 Wheat. 237, 250, 6 L. Ed. 463 (1826), semble.

When the plaintiff has performed with insubstantial defects he can use the common counts. Hancock v. Ross, 18 Ga. 364 (1855); Walsh v. Jenvey, 85 Md. 240, 36 Atl. 817, 38 Atl. 938 (1897).

When, despite partial breach, the plaintiff can recover as if he had fully performed, the common counts lie. Gandell v. Pontigny, 4 Camp. 375 (1816); Sykes v. Summerel, 2 Browne (Pa.) 225 (1812). But see, contra, Archard v. Horner, 3 C. & P. 349 (1828); Smith v. Hayward, 7 A. & E. 544 (1837), semble.

The plaintiff cannot recover for what he has performed by the common counts and for damages as to the future by a special count. Bishop v. Chicago, 62 Ill. 188 (1871); Beecher v. Pettee, 40 Mich. 181 (1879). But see, contra, Leslie v. Joliet Bridge & Iron Co., 149 Ill. App. 210 (1909).

If the defendant totally prevents the plaintiff from performing, the latter must use a special count. Hagedorn v. Laing, 6 Taunt. 166 (1815) semble; Atkinson v. Bell, 8 B. & C. 277 (1828); Truitt v. Fahey, 3 Pennewill (Del.) 573, 52 Atl. 339 (1902); Hunneman v. Grafton, 10 Metc. (Mass.) 454 (1845); Stearns v. Washburn, 7 Gray (Mass.) 187 (1856); Loranger v. Davidson, 110 Mich. 605, 68 N. W. 426 (1896); Trenton City Bridge Co. v. Perdicaris, 29 N. J. Law, 367 (1862).

If the plaintiff has performed fully according to the contract as modified, the common counts are sufficient. Prince v. Thomas, 15 Ark. 378 (1854); Petersen v. Pusey, 237 Ill. 204, 86 N. E. 692 (1908); B. & O. R. R. v. Lafferty, 2 W. Va. 104, 115 (1867).

ployed in taking an account of the stock in the plaintiff's mills, and in making a schedule thereof, which, when examined by the defendants' superintendent and found to be correct, was sent to the defendants about the 17th of March; that the defendants, between the 10th and 17th of March, took possession of the plaintiff's mills, and proceeded to work in two of them, and shut up and locked and took the key of the third; that the superintendent and workmen, who were previously employed by the plaintiff, were employed and paid by the defendants, after they so took possession; that carpets were made in the mills by the defendants, from materials taken by them of the plaintiff, and were sold by the defendants on their own account; that a quantity of wool, included in the schedule, which had been previously purchased by the plaintiff, but had not been removed by him to his mills, was sent to the defendants and used by them; and that on the 20th of March, the two mills which the defendants were so occupying, with some of the stock therein, were destroyed by fire.

SHAW, C. J.[20] This is an action for goods sold and delivered, and the questions arising in it are the more important on account of the large amount of property involved. A circumstance, which renders the case the more complicated and gives it the deeper interest, is, that a considerable part of the goods in controversy were destroyed by fire. If the property had then vested in the defendants, the risk and consequent loss were upon them; otherwise, the risk and loss were the plaintiff's. * * *

Here, it appears to us, the facts being satisfactorily proved, are all the elements prima facie of a complete sale and delivery of the stock, consisting of unfinished carpets in the loom, and of the yarn and wool. The stipulation was for the whole stock, described in general terms, at certain agreed rates; and when the account and inventory were completed, stating the quantities of each, and the agreed prices were applied, the amount of the whole purchase was ascertained; and this schedule, being sent to and accepted by the defendant's agents, was evidence upon that point. As to delivery, it is a familiar rule, that where there is a contract for the sale of personal property, delivery of the possession of the store or warehouse, where it is deposited, is a good delivery to complete the contract and vest the property in the vendee. Tarling v. Baxter, 6 B. & Cr. 360. Besides, the fact, that the defendants took actual possession of the stock and disposed of a considerable part of it on their own account, is quite conclusive on the subject of delivery.

The defendants, however, took a different view of the subject; and, when the plaintiff's evidence was in, moved the court to order a nonsuit, or to instruct the jury, that the action could not be maintained. The grounds taken were, that the memorandum was one entire

[20] The statement of facts is taken from the headnote, and portions of the opinion are omitted.

agreement; that the goods having been put into the possession of the defendants, subsequently to an entire agreement, it was incumbent on the plaintiff to prove performance, or a tender of performance, on his part, of such entire agreement; or a waiver and abandonment thereof and delivery on an independent and subsequent agreement. The court declined so to instruct the jury, but instructed them, that the contract was divisible, and that they need have no reference to the lease or to the real estate.

As we understand the argument, this objection divides itself into two distinct propositions: 1. That the plaintiff cannot recover, without setting out the entire agreement, and averring and proving performance or tender on his part;[21] 2. That he cannot recover on a general count, as for goods sold and delivered, but must set out the acts done under it, and hence establish the obligation of the defendants to make payment. * * *

II. The next ground taken was, that even if this stipulation in the contract was independent, it was yet part of one entire contract, and that the plaintiff could not recover on a count in indebitatus assumpsit for goods sold and delivered, but should have set out the special contract, and have alleged the existence of such facts as would render the defendants liable.

The general rule is, that notwithstanding goods have been sold under a special agreement, yet if the agreement has been executed, and all the terms and conditions complied with, it has ceased to be executory, and has resulted in a debt, or duty to pay money, and therefore the vendor may recover thereon, in a count in indebitatus assumpsit. If the facts are not such as to prove that the defendant is indebted for the goods, then the contract is executory, and the plaintiff must set it out specially and truly, with the terms and conditions, and allege performance on his part. Felton v. Dickinson, 10 Mass. 287; Baker v. Corey, 19 Pick. 496.

Nor are we aware of any difference between the case, where the contract for the sale of goods is single and disconnected with other stipulations, and where it is a separate and independent stipulation, embraced in the same contract with other stipulations, on either or both sides. The principle is the same; that which was an executory undertaking, has been executed and become a debt alike in both cases. And it appears to us, that the case is not without authority. Mayfield v. Wadsley, 3 B. & Cr. 357. Where an outgoing tenant had agreed with an incoming tenant, to take the crop of wheat growing on forty acres, at a fixed price, and also to purchase certain dead stock and a machine on the farm, at a valuation of a third person, which valuation was made accordingly, there was some difference of opinion among the judges, whether the plaintiff could recover in indebitatus

[21] The court held that the completion of the lease was not a condition precedent to the defendant's obligation to pay for the yarn and other goods.

assumpsit for the growing crops, on the ground, that being part of the realty, the contract in relation thereto was contrary to the statute of frauds, but a majority of the court held, that he could recover for the whole, and all the judges agreed, that for the dead stock, which was to be taken at a valuation, indebitatus assumpsit would lie. See also Stone v. Rogers, 2 Mees. & Wels. 443.

The true rule seems to be, as laid down in a recent case in this commonwealth, that if one contract to do several things, at several times, an action of assumpsit will lie on each default; for, although the agreement is entire, the performance is several, and the contract divisible in its nature. Badger v. Titcomb, 15 Pick. 409, 26 Am. Dec. 611. In this case, Mr. Justice Wilde traces back the rules of the common law upon this subject to an ancient period, when it was held, that but one action of debt would lie upon one contract; and points out the distinction between the actions of debt and assumpsit, the latter of which, in form and theory, is an action on tort, claiming damages for the violation of a promise; and he cites the authorities, on which the law has now finally settled down upon the more reasonable and equitable principle, that for each separate and distinct breach of a contract to do several things, an action will lie. And it appears, that this distinction between debt and assumpsit is not now regarded in England. By a recent English case, very like the present, it was held, that debt would lie for goods sold and delivered, on a separate and independent stipulation, to purchase and pay for goods, contained among several other mutual stipulations, in an agreement for a lease. Stone v. Rogers, 2 Mees. & Wels. 443.

The court are therefore of opinion, that the direction of the judge was right, in refusing to order a nonsuit when the plaintiff rested his case, and in instructing the jury, that the contract was divisible, so far as performance and the right to recover for non-performance were concerned; and that the jury need have no reference to the lease or to the real estate, nothing being to be done by the plaintiff respecting them, as a condition precedent to his right to maintain this action for the breach assigned. * * *

Judgment on the verdict.[22]

[22] Dees v. Self Bros., 165 Ala. 225, 51 South. 735 (1910); Leslie v. Joliet Bridge & Iron Co., 149 Ill. App. 210 (1909); Rogers v. Brown, 103 Me. 478, 70 Atl. 206 (1908) semble; Perkins v. Hart, 11 Wheat. (U. S.) 237, 250, 6 L. Ed. 463 (1826) semble. Accord. Stone v. Rogers, 2 M. & W. 443 (1837: an action of debt), is the same in principle.

If plaintiff has performed all he was to do before payment, the fact that he has later performances to complete is immaterial. Kyener v. Suwercropp, 1 Camp. 109 (1807); Caruthers v. Graham, 14 East, 578 (1811); Rohde v. Thwaites, 6 B. & C. 388 (1827); Massey Co. v. Stairs, 34 N. Bruns. 595 (1899); Hancock v. Ross, 18 Ga. 364 (1855).

NUGENT v. TEACHOUT.

(Supreme Court of Michigan, 1887. 67 Mich. 571, 35 N. W. 254.)

Error to circuit court, Mecosta county; C. C. Fuller, Judge.

Action in assumpsit for the price of real estate.

MORSE, J. It appears from the evidence on behalf of the plaintiff in this case that, on the eighteenth day of December, 1884, James Nugent and wife deeded to the defendant 40 acres of land in the township of Barton in Newaygo county. The expressed and actual consideration for this deed was $1,000. It was to be paid for as follows: Defendant was to pay a mortgage upon the premises of $700, and to convey to plaintiff an acre of land, upon which there was a house, in Cadillac. There was another mortgage of $50 upon the land deeded to defendant by Nugent, and also $40 back upon the Cadillac property, both of which sums plaintiff was to pay and satisfy. At the time of the trade the house at Cadillac was rented. The rent was to be applied on the $40. Teachout not only refused to deed the Cadillac property to Nugent but sold it to a third party. Thereupon plaintiff commenced suit to recover the balance of the purchase price of the 40 acres from defendant before a justice of the peace in the city of Big Rapids. He declared orally upon "all of the common counts" in assumpsit, and filed a bill of particulars as follows:

1884. Dec. 1. Balance of the purchase price of S. E. ¼ of S. E. ¼ of section 25, town 16 north, of range 11 west, sold by plaintiff to defendant	$250 00
1885. Feb. 1. To money had and received	10 00
1885. March 1. To money had and received	10 00
	$270 00

Defendant filed items of set-off as follows:

Dec. 1884. To interest on mortgage	$24 00
To money loaned	2 00

The two items of $10 each in plaintiff's bill were for moneys paid by him to Teachout towards the $40 on the lot at Cadillac. Plaintiff also paid $15.50 on the $50 mortgage.

The plaintiff had judgment in the justice's court for $261.50. Defendant appealed to the Mecosta county circuit court. Upon the trial in that court, before a jury, the plaintiff recovered a judgment for $224.95. The testimony in favor of the plaintiff was all taken under objection, and the contention of the defendant in that court and this is that the plaintiff under his own showing could not recover upon the common counts. It is insisted that he should have declared specially upon the contract for the exchange of the lands, and alleged the breach of such contract, and the damages arising from such breach. The counsel for plaintiff claim that under the common counts they are entitled to recover, because the contract was expressly rescinded by the defendant when he deeded the Cadillac property to another. The plaintiff was then at liberty to acquiesce in this rescission, and sue the

defendant for the value of the land conveyed to him by plaintiff. They also claim that "all the common counts" include a count for "lands sold and conveyed." See 1 Chit. Pl. 340, 343, 344.

It has not generally been understood in this state that the common counts as used in our practice and pleading include a count for real property sold and conveyed. All the blanks in use, and the precedents given in the works on practice in this state, do not contain any such count as one of the "common counts." Upon an oral declaration in justice's court upon all the "common counts," the defendant would not naturally be apprised that the recovery was intended upon such a count. In this case, however, the bill of particulars notified defendant fully of the nature of the plaintiff's claim. Pleadings in justice's court have always been liberally construed, and substance rather than form has been regarded in passing upon them. The chief object of a declaration is to plainly apprise the opposite party of the cause of action and claim of the plaintiff. When this is clearly done, and a cause of action is stated, the pleading is sufficient. The bill of particulars is explanatory of the declaration, and an amplification of it. In this case the bill of particulars notified defendant that the plaintiff claimed the unpaid balance upon the land sold and conveyed to the defendant, and also informed him that the recovery of it was claimed under the declaration upon "all of the common counts" in assumpsit.

If, therefore, the count for lands sold and conveyed can be regarded as one of the common counts, the plaintiff could maintain his action under his pleadings, provided his claim was one that did not require a special count. According to Chitty the common counts were of four descriptions—First, the indebitatus count; secondly, the quantum meruit; thirdly, the quantum valebat; and, fourthly, the account stated. The indebitatus count includes a count for real property sold, and such count was used to recover the price or value of an estate sold by the plaintiff to the defendant. See 1 Chit. Pl. (16th Amer. Ed.) 351, 352, 354; Siltzell v. Michael, 3 Watts & S. (Pa.) 329.[23] And it has been held in many cases that where the agreement to pay the price of the land was to pay the same in money, such price could be recovered under a general count for lands sold and conveyed. Nelson v. Swan, 13 Johns. (N. Y.) 483; Bowen v. Bell, 20 Johns. (N. Y.) 338, 11 Am. Dec. 286; Whitbeck v. Whitbeck, 9 Cow. (N. Y.) 266, 18 Am. Dec. 503; Goodwin v. Gilbert, 9 Mass. 510; Felch v. Taylor, 13 Pick. (Mass.) 133; Pike v. Brown, 7 Cush. (Mass.) 133; Basford v. Pearson, 9 Allen (Mass.) 387, 85 Am. Dec. 764; Elder v. Hood, 38 Ill. 533.

[23] Hallen v. Runder, 3 Tyrwh. 959, 963 (1834) semble; Long v. Woodman, 65 Me. 56 (1875: was used); Peabody v. Fellows, 177 Mass. 290, 58 N. E. 1019 (1901); 2 Chitty, Pleading (13th Am. Ed.) *39. Accord. Weigley v. Weir, 7 Serg. & R. (Pa.) 311 (1821) semble; Lewis v. Culbertson, 11 Serg. & R. (Pa.) 49, 14 Am. Dec. 607 (1824) semble. Contra.

Fixtures sold and conveyed is a good count. Hallen v. Runder, 3 Tyrwh. 959 (1834).

We are of the opinion that the plaintiff could proceed under his declaration and bill of particulars in this case, the same as if he had specifically named a count for lands sold and conveyed as one of the common counts, or as if he had counted generally for lands sold and conveyed.

But it is insisted that the contract in this case was not to pay any money for the land, but to exchange other property, to wit, the house and lot at Cadillac, for the same, and that in such case the contract and the breach of the same must be specially averred. The general rule is as claimed by defendant's counsel. When property, some specific thing or things, is to be delivered in payment of the lands, the agreement to so deliver, and the breach of the same, must be specially alleged. When a special contract has been wholly performed by one of the parties to it, and the other party can only perform his part by the payment of money, the money thus due can be recovered upon the common counts in assumpsit. But when the contract on the part of the defendant is not to pay money, but to deliver to the plaintiff specified articles of property, the right of the plaintiff to recover the money arises, not from the performance of the contract on his part, but from the failure of the defendant to deliver the property; consequently such failure must be specially pleaded. Phippen v. Morehouse, 50 Mich. at page 540, 15 N. W. 895; King v. Kerr, 4 Chand. (Wis.) 159; Bradley v. Levy, 5 Wis. 400.

It is claimed by defendant's counsel that in this case the plaintiff was not entitled to recover by simply showing that he had performed his part of the contract. The obligation of the defendant to pay money for the land did not spring out of the performance of the plaintiff, but because the defendant refused to deliver the deed of the Cadillac property. Therefore the plaintiff should have declared specially, and cannot recover on the money counts. But it must be remembered that this promise, on the part of the defendant, to convey the Cadillac property in part payment of the lands received by him, was an oral one, and therefore within the statute of frauds, and one that he could not be obliged to perform.

What, then, are the rights, and what is the remedy, of the plaintiff? He has conveyed the 40 acres to the defendant, and the defendant has received it, and accepted the benefit of it. Does he not, in equity and good conscience, owe the plaintiff the balance of the price or value of the land in money? Is there not an implied promise on the part of the defendant to pay the plaintiff the price or value of the land conveyed? We think there is. Although he was not obliged to convey the Cadillac property, because his promise to do so was void under the statute of frauds, yet his refusal to convey had the effect to rescind the contract, and raised an implied promise to pay for what he had received upon it. Gray v. Hill, Ryan & M. 420; Basford v. Pearson, 9 Allen (Mass.) 387, 392, 85 Am. Dec. 764.

The case was properly submitted to the jury upon the theory that,

if the plaintiff's version of the transaction was right, he was entitled to recover the difference between the price of the land and the amount of the $700 mortgage, principal and interest, less what plaintiff had not paid upon the $50 mortgage, which defendant had paid in full.

The judgment is affirmed with costs.[24]

CHAMPLIN, J., concurred. SHERWOOD, J., in the result. CAMPBELL, C. J., did not sit.

CITY OF CHICAGO v. CHICAGO & N. W. RY. CO.

(Supreme Court of Illinois, 1900. 186 Ill. 300, 57 N. E. 795.)

Appeal from appellate court, First district.

Action by the city of Chicago against the Chicago & Northwestern Railway Company. From a judgment in favor of defendant, affirmed by the appellate court (87 Ill. App. 611), plaintiff appeals. Affirmed.

CARTWRIGHT, J.[25] This suit came on for trial in the superior court of Cook county upon an issue formed by a declaration of appellant containing only the common counts and a plea of non assumpsit filed thereto by appellee. * * *

Chicago avenue runs east and west and Halsted street north and south in the city of Chicago, and the tracks of defendant cross these streets near the point of intersection, running in a diagonal direction from southeast to northwest. Plaintiff, in order to maintain the issue on its part under the common counts, offered evidence that the tracks obstructed the public use of the streets to such an extent that it became necessary at the point of intersection, in order to restore the streets for the use of the public, to build a viaduct over the tracks, with approaches on Halsted street and Chicago avenue; that plaintiff built such viaduct and approaches, and defendant contributed a large part of the cost thereof; that suits were brought against plaintiff by owners of

[24] The cases in accord are very numerous. The following citations will suffice: Towers v. Barrett, 1 T. R. 133 (1786: plaintiff under privilege rescinded); Kirkland v. Oates, 25 Ala. 465 (1854: contract rescinded by mutual consent); Hancock v. Ross, 18 Ga. 364 (1855: plaintiff in substantial default on special contract); City of Elgin v. Joslyn, 136 Ill. 525, 532, 26 N. E. 1090 (1891: waiver of tort); Morriss v. Wills, 5 Har. & J. (Md.) 120 (1820: recovering indemnity against joint debtor); Raymond v. Eldridge, 111 Mass. 390 (1873: defendant boarded plaintiff's expelled children); Clark v. Pinney, 6 Cow. (N. Y.) 297 (1826: money paid on judgment subsequently reversed); Amer. Co. v. McAden, 109 Pa. 399, 1 Atl. 256 (1885: recovery back of premiums where policy repudiated); Tatro v. Bailey, 67 Vt. 73, 30 Atl. 685 (1894: contract became impossible of performance); Hoppess v. Straw, 10 Leigh (Va.) 348 (1839: plaintiff paid money defendant was bound to pay).

That defendant's performance was by the contract to have been something other than money is immaterial, where the contract is rescinded. Bassett v. Sanborn, 9 Cush. (Mass.) 58, 67 (1851); Allen v. McNew, 8 Humph. (Tenn.) 46, 55 (1847).

That the rescinded contract was under seal is immaterial. Selby v. Hutchinson, 9 Ill. 319, 328 (1847).

[25] Part of the opinion omitted.

property abutting on the approaches to recover damages to their property resulting from such construction, and that judgments were recovered by such owners against plaintiff, which it paid. Defendant objected to the proffered evidence on the ground that it was not admissible under the common counts. The objection was sustained, and the evidence was not admitted. There being no evidence in support of the declaration, the court instructed the jury to return a verdict for defendant, which they did, and judgment was entered accordingly. The branch appellate court for the First district affirmed the judgment.

The various counts of the declaration were the following: First, indebitatus assumpsit for goods, wares, and merchandise sold and delivered; second, quantum valebant for goods, wares and merchandise sold and delivered; third, a consolidated money count in indebitatus assumpsit for money loaned, money paid, laid out, and expended for defendant at its request, money had and received by defendant for the use of plaintiff, money due and owing for interest, and money due for work and material; fourth, a count for money found due upon an account stated. The common counts are founded upon an expressed or implied promise on the part of the defendant to pay money to the plaintiff in consideration of a precedent and existing debt. It has often been said that, where there is a contract fully performed, and nothing remains to be done but the payment of money by the defendant, the liability may be enforced under the common counts. It is said that in this case nothing remains to be done by the defendant but to pay the money demanded by the plaintiff. But that may be said of a defendant in any case, and the other part of the proposition—that there must be a contract fully performed by the plaintiff—cannot be ignored. There was no contract relation between the plaintiff and defendant with respect to the payment of these damages, or concerning any liability of defendant therefor. Appellant sought to prove, not a contract expressed or implied, but an alleged duty of defendant which was performed by plaintiff. There is no pretense that the defendant ever recognized the validity of the claims of property owners, or the amount of damages, or agreed in any manner to pay or satisfy them. No count of this declaration would give any hint to the defendant of the claim against which it was called upon to defend, and, of course, the evidence could not be applied to the counts for goods, wares, and merchandise, money loaned, money had and received, interest, labor, and material, or money due on an account stated. They are all utterly foreign to the claim made at the trial. The only count under which it seems to be claimed that the evidence was admissible is the count for money paid out for defendant at its request. It is argued that, if the evidence had been admitted, it would have established defendant's duty and legal obligation to build a viaduct, so as to restore the streets to proper condition for public use; that it would have proved that plaintiff performed such duty to the public owing by defendant; that, if defendant had performed the duty,

it would have become liable to pay damages to property owners suffered by reason of the construction of the viaduct and approaches; and that in performing the duty plaintiff became liable to pay these damages, and paid them. It is argued that from these facts the law would raise an implied promise on the part of the defendant to repay plaintiff the money so paid. An action under this count, however, is only sustainable where the money was paid upon the request expressed or implied, of the defendant. 2 Enc. Pl. & Prac. 1012; 1 Chit. Pl. 350; 1 Shinn, Pl. & Prac. 488. It is not sufficient that defendant was benefited by the payment, but it must have been done at its request, expressed or implied; and plaintiff could only recover on proof of facts that would show such a request of the defendant. One party cannot voluntarily make himself a creditor of another; and, if plaintiff paid the obligation of the defendant without its knowledge or consent, it cannot recover such payment back under this count. Durant v. Rogers, 71 Ill. 121.

Again, the alleged liability was not for a debt, but for unliquidated damages, which the plaintiff claims were caused by the performance of a duty owing to the public by defendant. The evidence did not relate to the payment of a debt, but of unliquidated damages. The defendant was not a party to the suits by the property owners, either on the record or by notice from defendant to appear and defend, and it was not bound by the judgments recovered. The admission of the evidence in this case would involve a trial upon the merits and an inquiry into the actual damages sustained by the property owner in each case. The amounts paid by the plaintiff being in the nature of unliquidated damages, and not debts due from the defendant, the declaration must be special.[26] 2 Enc. Pl. & Prac. 1014; 1 Chit. Pl. 350. The court was right in refusing to admit the evidence under the pleadings. The judgment of the branch appellate court is affirmed. Judgment affirmed.[27]

MAGRUDER, J., dissents.

[26] That special assumpsit would lie, see, also, Moore v. Appleton, 26 Ala. 633 (1855) semble.

It seems that special assumpsit cannot be maintained where the recovery would not be damages. Hickman v. Searcy, 9 Yerg. (Tenn.) 47 (1836) semble; Thompson v. French, 10 Yerg. (Tenn.) 452 (1837) semble.

[27] Child v. Morley, 8 T. R. 610 (1800); Spurrier v. Elderton, 5 Esp. 2 (1803); Sills v. Laing, 4 Camp. 81 (1814); Seaver v. Seaver, 6 C. & P. 673 (1834). Accord. Brown v. Hodgson, 4 Taunt, 189 (1811). Contra.

But if the plaintiff is suing for a "sum certain" less damages caused the defendant the common courts are proper. Basten v. Butler, 7 East, 479 (1806: simply were used); White v. Oliver, 36 Me. 92 (1853: simply were used); Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713 (1834: simply were used); Dermott v. Jones, 2 Wall. 1, 9, 17 L. Ed. 762 (1864); Michigan Co. v. Busch, 143 Fed. 929, 75 C. C. A. 109 (1906).

Apparently no assumpsit will lie for the breach of official duty, where the recovery would be a "sum certain." Bailey v. Butterfield, 14 Me. 112 (1836); School v. Tebbetts, 67 Me. 239 (1877: generally) semble. But see Adams v. Farnsworth, 15 Gray (Mass.) 423 (1860: was used). The rule is the same

MARRIOT v. LISTER.

(Court of Common Pleas, 1762. 2 Wils. 141.)

Case upon eight several counts in assumpsit: upon the general issue there was a general verdict and damages given for the plaintiff upon all the counts. And now it was moved in arrest of judgment that one of the counts was bad, and therefore as entire damages were taken upon this count as well as the rest, judgment ought to be arrested: the count objected to runs thus: "Whereas James Lister (such a day and year, at such a place) was indebted to Thomas Marriot in £20 for the like sum before that time lent and advanced by the said Thomas to James Dalrymple, at the special instance and request of the said James Lister, and being so indebted, he the said James Lister in consideration thereof afterward, to wit, at such a time and place, promised to pay to the plaintiff the said £20 when requested."

PER CURIAM. The word lent is a technical term, and no man can be indebted to another for money lent, unless the money be actually lent to that person himself; but this count alleges, that the defendant is indebted to the plaintiff for money lent to a stranger, James Dalrymple. Now James Dalrymple is certainly indebted to the plaintiff, because the money was lent to James Dalrymple, and the law raises the promise which is not necessary to be proved; therefore if James Dalrymple is indebted to the plaintiff for this sum lent to him, the defendant cannot be also indebted to him for it, because there cannot be a double debt upon a single loan. This is a special undertaking or promise to pay a sum of money lent by the plaintiff to a stranger, which the law does not raise, and therefore such special promise is traversable, and must be proved; but upon an indebitatus assumpsit for money lent to a defendant, the law raises the promise, which is not traversable, and need not be proved. In short, it is absurd to affirm A. is indebted to B. for money lent to C., for the same money cannot be lent to two persons severally; and so is 1 Salk., Butcher against Andrews. And the judgment was arrested.[28]

where the recovery would be damages. McMillan v. Eastman, 4 Mass. 378 (1808); Parker v. Dennie, 6 Pick. (Mass.) 226 (1828) semble; Town v. Stacy, 10 Vt. 562 (1838).

[28] Anonymous, 1 Ventris, 293 (1675); Butcher v. Andrews, 1 Salk. 23 (1697); Mires v. Sculthorpe, 2 Camp. 215 (1809); Whitehead v. Howard, 5 Moore, 105; 116 (1820); Bulkley v. Landon, 2 Conn. 404, 414 (1818); Potter v. Gronbeck, 117 Ill. 404, 7 N. E. 586 (1886); Brand v. Whelan, 18 Ill. App. 186 (1885); Emerson v. Aultman & Co., 69 Md. 125, 134, 14 Atl. 671 (1888) semble; Northrup v. Jackson, 13 Wend. (N. Y.) 85 (1834) semble. Accord.

When are undertakings collateral is a question discussed usually in suretyship and is therefore omitted here. The general rule is that the common counts will lie on any undertaking not collateral within the cases under the statute of frauds. Power v. Rankin, 114 Ill. 52, 29 N. E. 185 (1885); Ames in 8 Harv. L. Rev. 264.

PENN v. FLACK.

(Court of Appeals of Maryland, 1831. 3 Gill & J. 369.)

Appeal from Mongomery County Court.

Assumpsit by the appellees, as the endorsees of the following promissory note, against the appellant, William G. Penn, as the maker thereof, commenced on the 11th of October, 1827:

"$80. Sixty days after date, I promise to pay to John Morrison, or order, eighty dollars, without defalcation, value received. Wm. G. Penn. May 21st, 1818." Endorsed: "Pay to James Flack, & Co. April 24th, 1824. John Morrison." [29]

The cause was argued before BUCHANAN, Ch. J., and EARLE, STEPHEN and ARCHER, JJ.

STEPHEN, J. delivered the opinion of the court.

This case presents two questions for the decision of this court. The first is, whether an endorsee of the payee of a note can maintain an action for money had and received against the maker? and the second, whether it is a material variance to declare that a negotiable note was endorsed by the payee before it became due, and to offer proof of an endorsement after it fell due? Upon the first question there is a contrariety of opinions in the books, but upon the most mature deliberation, we are of opinion that the action is maintainable, upon sound legal principles; the note is a contract by the maker to pay the money to the payee or his endorsee. It is well established, that in an action by the payee against the maker, the note is evidence upon a count for money had and received;[30] being therefore, evidence of money had and received to the use of the payee, by the maker, when the payee transfers his interest in the note by endorsement, (the note being payable to the payee or his order,) it would seem to follow, that by the very terms of the contract, the endorsee would become substituted in the place of the payee, and be invested with all his legal rights, not only as relates to a suit upon the note since the statute of Anne, but also as to the common law count of money had and received. In the case of Grant v. Vaughan, 3 Burrows' Rep. 1516, which was an action by the bearer of a bill of exchange against the drawer, which bill was in the following words, "Pay to Ship Fortune, or bearer," so much, Lord Mansfield makes the following remarks: "But upon the second count, (which was for money had and received,) the present case is quite clear, beyond

[29] Statement of facts abridged.

[30] Harris v. Huntbach, 1 Burr. 373 (1757); Catlin v. Gilder, 3 Ala. 536, 545 (1842); White v. Brown, 19 Conn. 577, 583 (1849); Boyle v. Carter, 24 Ill. 49 (1860); McCann v. Preston, 79 Md. 223, 28 Atl. 1102 (1894); Moore v. Moore, 9 Metc. (Mass.) 417 (1845); Conrad Co. v. McKittrick, 86 Mich. 191, 48 N. W. 1086 (1891); Hughes v. Wheeler, 8 Cow. (N. Y.) 77 (1827); Mitchell v. McCabe, 10 Ohio, 405 (1841); Jones v. Spear, 21 Vt. 426 (1849); M. & M. Bank v. Evans, 9 W. Va. 373, 384 (1876).

all dispute. For undoubtedly an action for money had and received to the plaintiff's use, may be brought by the bona fide bearer of a note made payable to bearer. There is no case to the contrary. It was certainly money received for the use of the original advancer of it; and if so, it is for the use of the person, who has the note as bearer. In this case, Bicknell himself might undoubtedly have brought this action. He lost it, and it came bona fide and in the course of trade, into the hands of the present plaintiff, who paid a full and fair consideration for it. Bicknell and the plaintiff are both innocent. The law must determine which of them is to stand the loss, and by law it falls upon Bicknell." In this case the bill was payable to bearer; in the case now before this court, it was payable to order, and it seems to us that it would require a considerable degree of legal ingenuity, to distinguish between the two cases, in point of legal principle, as to the legal operation of the two contracts. They were both negotiable in their characters, the only difference is, that the one was payable to bearer, the other to order. In Pierce v. Crafts, 12 Johns. (N. Y.) 90, the action was brought on two promissory notes: one was in the following words: "For value received, due Wm. Douglass or bearer, $14.50, with interest, payable the 1st of March next, Springfield, 8th Nov., 1811, signed James Pierce." The second note was dated, Dec. 25th, 1811, and the defendant promised for value received, to pay Wm. Douglass, or bearer, the sum of $18, with interest. In a suit brought upon these notes, the plaintiff below, under the direction of the court recovered, and upon a writ of error being brought to the Supreme Court, that court delivered the following opinion: "This was an action of indebitatus assumpsit, for money had and received, money lent, etc., and the chief question is, whether the promissory notes in the hands of the plaintiff below, as bearer, were properly admitted in evidence under such a count. It is clear, that as well before as since the statute making notes negotiable, the person named as payee, might give such note in evidence, under the general counts for money lent, or money had and received, etc." [here this court refers to a number of authorities, and amongst them, the case of Grant v. Vaughan, above referred to, and then proceeds:] "The statute of Anne gave an additional remedy, but did not take away the old one." "If, as all agree, such a note before the statute, was evidence of money due from the maker to the payee, so as to support a count for money had and received, I can see no good reason why an assignee by endorsement or delivery ought not to have the same remedy. It was the object of the statute to place the assignee in the same relation to the maker, as the payee stood in before; and the legal operation of the transfer is, that the money which by virtue of the note was due to the payee from the maker, is now due from the maker to the assignee. These notes were payable to William Douglass or bearer, like the form used in

bank notes. Bearer is descriptio personæ, of the real payee. It may be that Wm. Douglass had no knowledge of the note, or is a fictitious person. The note, however, is transferable by delivery merely, and possession was evidence of property in the plaintiff below, prima facie. It is objected by the counsel for the defendant, that here is no privity of contract between these parties; and several authorities were cited to show, that indebitatus assumpsit will not lie except between privies. To this objection there are two answers: First, there is a legal privity of contract between the maker of a negotiable note and the assignee or bearer in this case. It is a contract to pay the money to whoever may become entitled to it by transfer, as bearer; and such privity commences, as soon as the bearer becomes so entitled. Secondly, it is not true, that the action for money had and received can only be grounded on privity of contract. It lies against the finder of money lost. It is the proper action to recover money obtained by fraud or deceit. If a man without my authority, receive money due to me, I may recover it from him in this form of action, and certainly in these cases there is no privity of contract. In the case of Wayman v. Bend, 1 Campbell's Nisi Prius, 175, precisely like the present case, Lord Ellenborough decided, that the right of giving a promissory note in evidence under the general money counts, is confined to the original party to whom the note was payable. But this was a nisi prius opinion: and as the plaintiff in that case recovered on another count as endorsee of the same note, it never became material to revise the decision. That opinion of Lord Ellenborough contradicts the decisions of several of his illustrious predecessors. In the case of Tatlock v. Harris, 3 D. & E. 174, it was decided, that an endorsee of a bill of exchange may recover against the acceptor, under a count for money had and received;[81] and Lord Kenyon there says: "In making this decision we do not mean to infringe a rule of law, which is very properly settled, that a chose in action cannot be transferred; but we consider it as an agreement between all the parties, to appropriate so much property, to be carried to the account of the holder of the bill." In the case of Grant v. Vaughan, 3 Burr. 1516, it was decided, that indebitatus assumpsit for money had and received was a proper action to recover the value of a bill of exchange by the bearer against the drawer: and Lord Mansfield there says: "Undoubtedly an action for money had and received to the plaintiff's use, may be brought by the bona fide bearer of a note, made payable to a bearer; there is no case to the contrary." The case of Cruger v. Armstrong and Another, 3 Johns. Cas. (N. Y.) 5, 2 Am. Dec. 126, supports the same doctrine. The principles contained in this decision are fully sustained by the Supreme Court of the United States, in the Case of Raborg and others v. Peyton,

[81] Powell v. Ansell, 3 M. & G. 171 (1841). Contra.

2 Wheat. 385, 4 L. Ed. 268. In that case, (which was an action of debt [32] brought by the endorsees of a bill of exchange against the acceptor,) Mr. Justice Storey, in delivering the opinion of the court says: "Privity of contract may exist, if there be an express contract, although the consideration of the contract originated aliunde. Besides, if one person deliver money to another, for the use of a third person, it has been settled that such a privity exists, that the latter may maintain an action of debt against the bailee. In general, the legal predicament of the maker of a note is like that of the acceptor of a bill. Each is liable to the payee for the payment of the note or bill, in the first instance; and after endorsement each incurs the same liabilities." The judge, in delivering the opinion of the court, further remarks, that, "in point of law every subsequent holder, in respect to the acceptor of a bill, and the maker of a note, stands in the same predicament as the payee. An acceptance is as much evidence of money had and received by the acceptor to the use of such holder, and of money paid by such holder for the use of the acceptor, as if he were the payee."

The only remaining question is, whether, when a note is declared on by the endorsee against the maker as being endorsed before it is due, it is a material variance to prove it to have been endorsed after it became payable? In Chitty on Bills, 462, the law is stated to be, that "if a note payable to bearer be declared on as endorsed, the endorsement must be proved; but when the declaration states that the endorsement was after the making of the bill, and it appears in evidence to have been before, or that it was before the bill was due, and it appears in evidence to have been made afterwards, this is not a material variance." In support of this principle, he refers to Young v. Wright, 1 Campb. 139.

In this case we think it proper to observe, that it appears to us, that the prayer in the first bill of exceptions is too general under the act of 1825, but, as the prayer in the second bill of exceptions is sufficiently specific, and the case was fully argued, to prevent future litigation, we have delivered our opinions upon both exceptions.

We are of opinion, that there is no error in the judgment of the court below, and that it ought to be affirmed.

Judgment affirmed.[33]

[32] For references concerning debt on bills or notes, see Anonymous, post. p. 349.

[33] Dinsdale v. Lanchester, 4 Esp. 201 (1803); Eagle Bank v. Smith, 5 Conn. 71, 13 Am. Dec. 37 (1823); Ware v. Webb, 32 Me. 41 (1850); Cole v. Cushing, 8 Pick. (Mass.) 48 (1829); Tenney v. Sanborn, 5 N. H. 557 (1832); Olcott v. Rathbone, 5 Wend. (N. Y.) 490 (1830) semble. Accord. Waynam v. Bend, 1 Camp. 175 (1808). Contra.

An indorsee may sue his indorser in indebitatus assumpsit. State Bank v. Hurd, 12 Mass. 172 (1815); Elkinton v. Fennimore, 13 Pa. 173 (1850: non-negotiable). Accord. Worley v. Johnson, 60 Fla. 294, 53 South. 543, 33 L.

McMANUS v. CASSIDY.

(Supreme Court of Pennsylvania, 1871. 66 Pa. 260.)

October 24th, 1870. Before THOMPSON, C. J., and READ, AGNEW, SHARSWOOD, and WILLIAMS, JJ.

Error to the Court of Common Pleas of Armstrong county; No. 26, to October and November Term, 1869.

On the 30th of March, 1867, Robert Cassidy brought an action of assumpsit against Felix McManus and James G. Henry, partners as McManus & Henry. The action was to recover the balance due on 2,035 railroad ties delivered to the defendants under a contract under seal, made between the parties on the 9th of May, 1866, by which the plaintiff bound himself to deliver to the defendants 2,000 ties, described in the agreement, to be inspected and approved: in consideration of the plaintiff performing his covenants for delivering the ties the defendants agreed to pay him 60 cents per tie. The plaintiff gave in evidence that he had delivered, under the contract, 2,035 ties of the kind and in the manner stipulated in the contract. The ties amounted to $1,221, of which $1,047.74 had been paid to the plaintiff.

The defendants gave evidence in answer to the plaintiff's case, and submitted this point: Unless the jury believe that the sealed contract between the plaintiff and defendants was abandoned by both and all the parties, the plaintiff cannot recover.

The court (Buffington, P. J.) denied the point, and reserved it. He further charged: * * * "No doubt the plaintiff might have brought his action on the special agreement, but we are of opinion [he may sustain the present form of action if he fully performed the agreement on his part by furnishing the entire number of ties agreed upon.] There are cases where assumpsit will not lie. Where the plaintiff seeks to recover on an executory contract which has not been entirely fulfilled on his part and has not been virtually rescinded by the defendant, [the action must be founded on the special

R. A. (N. S.) 639 (1910) semble. Contra. So he may sue a remote indorser. Ellsworth v. Brewer, 11 Pick. (Mass.) 316 (1831). Accord. M. & M. Bank v. Evans, 9 W. Va. 373, 384 (1876) semble. Contra.

It has been held that, while a common-law debt is presumed to exist between any two parties to a note, this may be overthrown by evidence. Page v. Bank, 7 Wheat. 35, 5 L. Ed. 390 (1822); Bank v. Jackson, 36 Va. 221 (1835).

The common counts will lie by payee against drawer of a bill. Hodges v. Steward, Skinner, 346 (1694); Hard's Case, 1 Salk. 23 (1702).

Also by payee against acceptor. Henry v. Hazen, 5 Ark. 401 (1843); Wells v. Brigham, 6 Cush. (Mass.) 6, 52 Am. Dec. 750 (1850); Raborg v. Peyton, 2 Wheat. 385, 4 L. Ed. 268 (1817) semble. Accord. Brown v. London, 1 Lev. 298 (1670); Hard's Case, 1 Salk. 23 (1702) semble; Welsh v. Craig, 2 Str. 680 (1726) semble; Mackie v. Davis, 2 Va. 219, 229, 1 Am. Dec. 482 (1796) semble. Contra.

It is held in Hodges v. Steward, Salk. 125 (1692), that the common counts will not lie by an indorsee against the drawer.

agreement. But not so where the agreement has been entirely complied with by the plaintiff, the consideration on his part entirely executed, nothing left unfinished and nothing to be done by defendants but simply to pay the amount agreed upon.] Especially is this the case where the contract has been more than fulfilled by the plaintiff, and accepted and enjoyed by the defendant. [If the jury, therefore, believe that the contract was fully complied with by the plaintiff, by the delivery of the number agreed upon, or a number exceeding that agreed upon, which were accepted, inspected and approved, we are of opinion that he may recover in this form of action for the entire number so delivered and inspected.] And we further are of the opinion that the written contract may be resorted to, to fix and ascertain the measure of damages. If, however, the jury should fail to find the contract to be completed by the plaintiff, he cannot recover." * * *

The jury found for the plaintiff $183.65, and the court afterwards entered judgment on the verdict for the plaintiff on the reserved point. The defendants took a writ of error, and assigned for error the denial of their point and the parts of the charge in brackets.

The opinion of the court was delivered, January 3d, 1871, by

AGNEW, J. With a great desire to sustain this judgment, we find ourselves unable to do so without assuming legislative powers. The courts both of England and of this state have felt themselves bound by the common law to maintain the boundaries between actions. Where a plaintiff has misconceived the form of his action, he must be turned out of court to begin anew, no matter what be the merit of his cause. This is a blot upon our jurisprudence, and should be remedied by the legislature. It can easily be done by simply giving to the courts the power to permit an amendment of the form of the action at any stage of the cause. Why should any one be turned away because of the dress in which he appears in court? The action in this case should have been covenant, and not assumpsit. It is certainly true, and well settled by authority, that when a special contract has been fully performed, the party who has fully performed it may maintain general indebitatus assumpsit, and declare in the common counts for the work and labor or services rendered under it; Kelly v. Foster, 2 Bin. 4; Miles v. Moodie, 3 Serg. & R. 211; Algeo v. Algeo, 10 Serg. & R. 235; Harris v. Ligget, 1 Watts & S. 301; Siltzell v. Michael, 3 Watts & S. 329; Eckel v. Murphey, 15 Pa. 488, 53 Am. Dec. 607; Edwards v. Goldsmith, 16 Pa. 43. The reason and foundation of this doctrine appears to be that when a service has been fully performed, a duty to compensate for it seems to arise independently of the special agreement. This, however, is really only seemingly so, and is probably fallacious, but the doctrine appears to be well settled, as the

cases cited show. Yet, as the evidence that the doctrine cannot bear a severe test, we find it decided in several cases that part performance will not suffice, nor will prevention stand for full performance, and there the plaintiff must declare upon the special agreement, and show wherein his part performance will entitle him to recover: Algeo v. Algeo, supra; Harris v. Ligget, supra; Eckel v. Murphey, supra. All these cases, however, are where the special agreement has been by parol or a simple contract in writing. On a careful examination, I have not found a single case where the special agreement was under seal. The doctrine seems to be universal that where the cause of action arises upon a specialty, or sealed writing, the action must be covenant or debt, as the case may be.[34] The only exception to this is where the specialty has been altered by parol to such an extent as to make it a new contract, thereby turning the whole into parol;[35] or where the specialty is abandoned and a new and independent contract made, though referring to the sealed instrument for some of its terms.[36] Such are the cases of Vicary v. Moore, 2 Watts, 451, 27 Am. Dec. 323; Vaughan v. Ferris, 2 Watts & S. 46; Spangler v. Springer, 22 Pa. 455; Lawall v. Rader, 24 Pa. 283; Lehigh Coal & Nav. Co. v. Harlan, 27 Pa. 441. And a distinction is taken between a mere waiver of a term of the plaintiff's contract, which stands as a condition precedent to his action, and the contract of the defendant on which the action is founded. See Jordan v. Cooper, 3 Serg. & R. 564; Green v. Roberts, 5 Whart. 84; McCombs v. McKennan, 2 Watts & S. 216, 37 Am. Dec. 505; Lehigh Coal & Nav. Co. v. Harlan, 27 Pa. 441, 442. In the argument the case of McGrann v. North Lebanon Railroad Co., 29 Pa. 82, has been referred to as a case of a specialty, where an action of assumpsit was sustained after performance. But the case is really put on the ground that the special contract had been abandoned,

[34] Bennus v. Guyldley, Cro. Jac. 505 (1619); Bulstrode v. Gilburn, 2 Str. 1027 (1734); Phillips v. American Guano Co., 110 Ala. 521, 18 South. 104 (1895); North v. Nichols, 37 Conn. 375 (1870); Magruder v. Belt, 7 App. D. C. 303, 311 (1895); Johnston v. Salisbury, 61 Ill. 316 (1871); Ferguson v. Rhoades, 7 Blackf. (Ind.) 262 (1844); Rankin v. Darnell, 11 B. Mon. (Ky.) 30, 52 Am. Dec. 557 (1850); Dunn v. Motor Co., 92 Me. 165, 42 Atl. 389 (1898); Firemen's Co. v. Floss, 67 Md. 403, 10 Atl. 139, 1 Am. St. Rep. 398 (1887); Codman v. Jenkins, 14 Mass. 93 (1817); Knowlton v. Tilton, 38 N. H. 257 (1859); Outcalt v. Huffman, 3 N. J. Law, 818 (1811); Hamilton v. Hart, 109 Pa. 629 (1885); Crandall v. Johnson, 26 R. I. 250, 58 Atl. 765 (1904); Marine Co. v. Young, 1 Cranch, 332, 342, 2 L. Ed. 126 (1803); McKay v. Darling, 65 Vt. 639, 27 Atl. 324 (1893); State v. Harmon, 15 W. Va. 115 (1879). Accord.

[35] Heard v. Wadham, 1 East, 619, 630 (1801) semble; Smith v. Sharpe, 162 Ala. 433, 50 South. 381, 136 Am. St. Rep. 52 (1909); Knowlton v. Tilton, 38 N. H. 257 (1859) semble; Carrier v. Dilworth, 59 Pa. 406 (1868); Baird v. Blaigrove, 1 Va. 170 (1793). Accord. So if the law alters the contract, according to McCardell v. Miller, 22 R. I. 96, 46 Atl. 184 (1900).

[36] Sturlyn v. Albany, Cro. Eliz. 67 (1587); Smith v. Sharpe, 162 Ala. 433, 50 South. 381, 136 Am. St. Rep. 52 (1909); Fry v. Talbott, 106 Md. 43, 66 Atl. 664 (1907); Mill Dam v. Hovey, 21 Pick. (Mass.) 417, 429 (1839); Miller v. Watson, 7 Cow. (N. Y.) 39 (1827). Accord.

though it must be admitted that no single ground is very distinctly stated, and the reasoning of the opinion is not clear. On the other hand, the cases of Irwin et al. v. Shultz, 46 Pa. 76, and Shaeffer v. Geisenberg, 47 Pa. 500, decide that assumpsit cannot be maintained upon performance of a contract under seal, and, indeed, they may be considered as really ruling the question before us, for in both cases the special contract had been completed before the action was brought. The judgment must therefore be reversed.

Judgment reversed.[37]

FIRST CONGREGATIONAL MEETING-HOUSE SOC. v. TOWN OF ROCHESTER.

(Supreme Court of Vermont, 1894. 66 Vt. 501, 29 Atl. 810.)

Exceptions from Windsor county court; Munson, Judge.

Action by the First Congregational Meeting-House Society against the town of Rochester to recover one-third the expense of repairs to meeting-house. Judgment was rendered for plaintiff, and defendant excepts. Affirmed.

Ross, C. J.[38] 1. The defendant's exceptions as to the admission of the lease in evidence, to the refusal to order a verdict in its favor, and to the refusal to comply with its requests, numbered 1 to 7, inclusive, concentrate in the contention that on the proof the plaintiff did not entitle itself to maintain assumpsit. The first count of the declaration is special assumpsit to recover of the defendant its proportion of certain repairs, as fixed by a written lease, of the plaintiff's meeting-house and grounds, executed March 6, 1849. The lease is defectively executed by the plaintiff, but it was stipulated on the trial that the trial should proceed the same as it would if the lease had been properly executed. The lease, under this stipulation, is to be treated as properly signed, sealed, and acknowledged by the plaintiff. It is a deed poll. It is not in form an indenture, and is neither signed nor sealed by the defendant. By taking possession under it the defendant accepted the lease, and became bound to carry out and perform those provisions of it which rested upon it to perform. Such acceptance did not make the lease an instrument under the seal of the defendant. In law it was similar to, and no more than, a written acceptance of its provisions, signed by the defendant, but not under its seal. As to the defendant, such written acceptance would make the whole instrument unsealed on its part. The defendant stands related to the lease, like parties to an instrument executed under the seal of each, on which the time of performance has been extended by parol, or by writing not under seal. In such case covenant will not lie, but assumpsit will.

[37] Warren v. Ferdinand, 9 Allen (Mass.) 357 (1864). Accord.

[38] Part of the opinion omitted.

Sherwin v. Railroad Co., 24 Vt. 347; Barker v. Railroad Co., 27 Vt. 766; Smith v. Smith, 45 Vt. 433; Johnson v. Muzzy, 45 Vt. 419, 12 Am. Rep. 214.

In regard to the items sought to be recovered, the lease was fully executed by the plaintiff. In respect to these items, it was not executory; but, if executory, recovery could be had under the first count. These exceptions are not sustained. The plaintiff could maintain this action of assumpsit if properly sustained by the evidence. * * *

Judgment affirmed.[39]

START, J., being engaged in county court, did not sit.

SECTION 2.—NECESSARY ALLEGATIONS

I. SPECIAL ASSUMPSIT

DECLARATION IN SPECIAL ASSUMPSIT.

(2 Chitty, Pleading [13th Am. Ed.] pp. *17, *328, *329.)

In the Common Pleas.

——— next after ——— in Michaelmas Term, 1 Will. 4.

Middlesex, (to wit) C. D. was attached to answer A. B. of a plea of trespass on the case upon promises; and thereupon the said A. B. by E. F. his attorney, complains:

For that whereas heretofore, to wit, on, etc. (date of agreement) to wit, at, etc. (venue) by a certain agreement then and there made between said plaintiff and the said defendant, the said plaintiff agreed to perform and complete the mason work, at the Regent's Circus, north end of Portland Place, in the New Road, at the following prices, finding all materials and labor, and to do the same to the satisfaction of the architect appointed to survey the same; that is to say, straight Portland kirb, twelve inches by ten inches, with rail holes, plugs and lead, including the stone for the brace bar, at seven shillings and five pence per foot, run circular ditto at eight shillings per foot, run bases for the lamp irons two feet four inches and three-quarters, by two feet four inches and three-quarters, and twelve inches high, at two pounds each, including rail-holes, and to do the whole complete in all

[39] Sutherland v. Leshnan, 3 Esp. 42 (1800); Willenborg v. Ry. Co., 11 Ill. App. 298 (1882); Baldwin v. Emery, 89 Me. 496, 36 Atl. 994 (1897); Pike v. Brown, 7 Cush. (Mass.) 133 (1851); Gale v. Nixon, 6 Cow. (N. Y.) 445 (1826); Pratt v. Harding, 30 Pa. 525 (1858). Accord.

It has been held that a beneficiary, suing on a contract under seal, must use assumpsit. Snow v. Merriam, 133 Ill. App. 641 (1907); Varney v. Bradford, 86 Me. 510, 30 Atl. 115 (1894; not clear). Accord. Abe Lincoln Soc. v. Miller, 23 Ill. App. 341 (1887). Contra.

respects according to the drawings, and within the time specified in the specification delivered; and it was also then and there agreed between the said plaintiff and the said defendant, that he the said defendant should advance £12. in cash, for every hundred feet set complete, and the balance by bill at two months, after the accounts were adjusted; the whole of the Portland stone, kirb and gate bases on the south side of the whole line of the new road, from east to west, to be fixed and made complete, in all respects, on or before the 25th day of November, in the year aforesaid, and the half-circle area to be made complete on or before the 25th day of December in the same year; and part of the work having then already been done by G. H. it was thereby further understood that the same should be ascertained by L. M. of, etc. surveyor, on the part of the said defendant, and E. F. of, etc. on the part of the said plaintiff; and in case any dispute should arise, the same to be decided by their umpire, and the balance paid to the said G. H. as well as the money then already advanced to him by the said defendant, was to be accounted for by the said plaintiff, and deducted from the balance due to him, when completed, but at present to draw only for the setting the same; and the said agreement being so made, afterwards, to wit, on, etc. aforesaid, at, etc. (venue) aforesaid, in consideration thereof, and that the said plaintiff, at the special instance and request of the said defendant, had then and there undertaken, and faithfully promised the said defendant, to perform and fulfill the said agreement, in all things on the said plaintiff's part and behalf to be performed and fulfilled, he the said defendant undertook, and then and there faithfully promised the said plaintiff to perform and fulfill the said agreement in all things on the said defendant's part and behalf to be performed and fulfilled; and although the said plaintiff hath always, from the time of the making of the said agreement, performed and fulfilled, all things on his part and behalf in the said agreement to be performed and fulfilled, and did afterwards, to wit, on the day and year first aforesaid, at, etc. (venue) enter upon and commence the said work and for that purpose did procure and find all materials and labor necessary for performing the same, and did the same in part, to wit, one thousand two hundred feet thereof, to the satisfaction of the architect appointed to survey the said work, and hath always been ready and willing to perform and complete the whole of the said work, in pursuance of the said agreement, of all which said premises the said defendant hath had notice, to wit, at, etc. (venue) aforesaid: yet the said plaintiff in fact saith, that the said defendant, contriving and wrongfully intending to injure the said plaintiff, did not nor would perform the said agreement, nor his said promise and undertaking, but thereby craftily and subtly deceived the said plaintiff in this, to wit, that the said defendant did not nor would advance the said sum of £12., in cash, for each of the said one hundred feet, set complete, but on the contrary thereof, hath hitherto wholly neg-

lected and refused so to do, to wit, etc. at, etc. (venue) aforesaid; and the said defendant further disregarding the said agreement, and his said promise and undertaking, afterwards, to wit, on, etc. to wit, etc. (venue) aforesaid, did not nor would permit or suffer the said plaintiff to proceed to complete the said work, and then and there would wholly hinder, and prevented him from so doing and then and there wrongfully discharged the said plaintiff from any further performance or completion of his said agreement and promise and undertaking, whereby the said plaintiff hath lost and been deprived of the profits and advantages which he otherwise might and would have derived and acquired from the completion of the said works, to wit, at, etc. (venue) aforesaid.

Wherefore the said plaintiff saith that he is injured and hath sustained damage to the amount of £———, and therefore he brings his suit, etc.

PENNY v. PORTER.

(Court's of King's Bench, 1801. 2 East, 2.)

In an action on the case for the non-delivery of wheat according to agreement, the first count of the declaration stated the contract to be, that in consideration that the plaintiff had agreed to purchase a large quantity, to wit, 100 bags of wheat, each bag weighing 300 lb. and for 40 bags, part of the same, to pay to the defendant £1. 16s. per bag, and for the remaining 60 bags to pay the market price at the then next market day; the defendant undertook to sell and deliver to the plaintiff 40 of the bags immediately, and the remaining 60 bags at the then next market day at the stipulated price. It then averred the sale and delivery of the first 40 bags in part performance of the contract, and set forth a breach as for the non-delivery of the remainder. The third count was similar in form, only stating the contract to be for the sale of 100 bags of wheat, 50 bags of which were to be sold and delivered immediately at the price mentioned, and the remaining 50 bags at the next market day, for the then market price. The contract was laid more generally in other counts. At the trial before Le Blanc, J., at the last assizes at Bristol, the contract proved was, that the defendant was to let the plaintiff have 100 bags of wheat, 40 or 50 bags to be delivered at the then present market for the stipulated price, and the remainder at the following market for the then market price. And further it was proved that the defendant immediately after delivered 40 of the bags, but did not deliver the remainder at the next market day. The question was, Whether the contract proved, being optional in the defendant to deliver 40 or 50 bags the first day, and the remainder the next market day, sustained the first count, stating the contract to be positively for the delivery of 40 bags on the first, and the remainder on the subsequent market day, inasmuch as the defendant

had decided his option by the delivery in fact of the 40 bags in the first instance? The jury, being of opinion that the defendant had an option to deliver 40 or 50 bags in the first instance, found a verdict for him under the learned judge's direction: and leave was given to move to set the verdict aside, and enter a verdict for the plaintiff for £3. 12s. damages, if the Court should be of a different opinion.

This matter was once before agitated in this Court in Hilary term last, when it underwent great discussion. It then came on upon a rule for setting aside a nonsuit in the first trial before Lord Eldon, at the preceding summer assizes, on the ground of the variance mentioned between the declaration and the evidence: and a new trial was granted on the ground of some uncertainty in the evidence, as to what the real contract was, which the Court thought should have been left to the jury to decide. But they then intimated a strong opinion, that if the contract were found to have been optional in the first instance, it could not be laid as an absolute contract for a certain number of bags, though in the event of the party's election of one of the alternatives.

Lens, Serjt., now moved to enter the verdict for the plaintiff, on the ground, that though the contract were optional in the defendant in the first instance, yet he having made his election to deliver 40 bags on the first day, thereby put an end to the option; and it might then be declared on as an absolute contract in effect to deliver those 40 bags on the first day, and the remaining 60 on the subsequent market day.

THE COURT however were of a different opinion, and held that the contract must be stated in the declaration according to the original terms of it, which made it optional in the defendant to deliver 40 or 50 bags in the first instance, and not an absolute contract for the delivery of either of those quantities.

Rule refused.[40]

[40] Curley v. Dean, 4 Conn. 259, 265, 10 Am. Dec. 140 (1822) semble; Russell v. South. Britain Society, 9 Conn. 508, 520 (1833): Hatch v. Adams, 8 Cow. (N. Y.) 35 (1827); Stone v. Knowlton, 3 Wend. (N. Y.) 374 (1829). Accord.

In any case the promise must be truthfully alleged to avoid a variance. Anonymous, 1 Ld. Raym. 735 (1701); Cooke v. Mumstone, 1 B. & P. (N. R.) 351 (1805); Wilkinson v. Moseley, 18 Ala. 288 (1850); Chittenden v. Stevenson, 26 Conn. 442 (1857); Menifee v. Higgins, 57 Ill. 50 (1870); Bannister v. Weatherford, 7 B. Mon. (Ky.) 271 (1847); Hilt v. Campbell, 6 Me. 109 (1829); Bull v. Schuberth, 2 Md. 38, 56 (1852); Read v. Smith, 1 Allen (Mass.) 519 (1861); Rose v. Jackson, 40 Mich. 29, 36 (1879); Perrine v. Hankinson, 11 N. J. Law, 181 (1829); Douglass v. Leland, 1 Wend. (N. Y.) 490 (1828); Davisson v. Ford, 23 W. Va. 617, 632 (1884).

The promise of the defendant must be alleged. Buckler v. Angil, 1 Lev. 164 (1665); Lea v. Welch, 2 Ld. Raym. 1516 (1727); Hill v. Nichols, 50 Ala. 336 (1874); Brown v. Starbird, 98 Me. 292, 56 Atl. 902 (1903); Cooper v. Landon, 102 Mass. 58 (1869); McNulty v. Collins, 7 Mo. 69 (1841); Candler v. Rossiter, 10 Wend. 487 (1833); Sexton v. Holmes, 17 Va. 566 (1813); Wolf v. Spence, 39 W. Va. 491, 20 S. E. 610 (1894).

Words equivalent to "promise" may be used. Coulston v. Carr, Cro. Eliz. 847 (1701); Mountford v. Horton, 2 B. & P. (N. R.) 62 (1805); Corbett v. Packington, 6 B. & C. 268 (1827); North v. Kizer, 72 Ill. 172 (1874); Avery v. Tyringham, 3 Mass. 160, 176, 3 Am. Dec. 105 (1807); Beardsley v. Southmayd, 14 N. J. Law, 534, 542 (1835); Woodson v. Moody, 4 Humph. (Tenn.

SMITH v. WEBSTER.

(Supreme Judicial Court of New Hampshire, 1868. 48 N. H. 142.)

Assumpsit, the declaration containing three counts, the two first on a special contract, and being similar, and the third for money had and received, and was not relied on at the trial. * * *

Case reserved.

SARGENT, J.[41] * * * Is there a variance between the contract as alleged and as proved? and is the variance material? In general a contract which is declared on as the ground of the defendant's liability must be proved substantially as alleged; and in a declaration alleging that the defendant promised to do certain things, the consideration on which the promise is founded must be proved as stated or the plaintiff will fail. 1 Ch. Pl. § 298, (9 Am. Ed.). But there is a difference in the rule applied to the two sides of such a contract. Chitty states the rule (1 Ch. Pl. § 317) in this way: "In stating the consideration, it is in all cases absolutely necessary that the whole of the entire consideration for the performance of the act in question should be set forth, and that when the contract has consisted of several engagements and promises quite distinct from each other, but founded on one and the same entire consideration, an action cannot be brought for the breach of any one of such engagements or promises, without setting forth in the declaration the entire consideration applicable to all the promises collectively. But," he adds, "the rule is different in stating the defendant's promise itself, for here the plaintiff is only required to set forth with correctness that particular part of the contract which he alleges the defendant to have broken."

According to that rule there is no variance in this case. The consideration of the defendant's promise was the payment of $100 cash, and that must be proved as stated, and was so proved. There is no controversy anywhere as to that. But in alleging the defendant's promise it is only said that he promised to sell and deliver one peddler's sleigh, and the proof is that he promised to sell and deliver one sleigh and seven boxes of lozenges. But the plaintiff does not

303 (1843); Union Stopper Co. v. McGara, 66 W. Va. 403, 409, 66 S. E. 698 (1909). Accord. Muldrow v. Tappan, 6 Mo. 276 (1840); Wolf v. Spence, 39 W. Va. 491, 20 S. E. 610 (1894). Contra.

† A promise implied in fact is declared on as an express promise. Payne v. Grant, 81 Va. 164, 168 (1885).

† An allegation of a promise "to pay the plaintiff" is good, without stating that it is a promise "to the plaintiff." Coulston v. Carr, Cro. Eliz. 847 (1701); Brown v. Boorman, 11 Cl. & F. 1, 6 (1844); McCredy v. James, 6 Whart. (Pa.) 547, 568 (1841). Accord. Buckler v. Angil, 1 Sid. 246 (1665); Myers v. Davis, Fed. Cas. No. 9,986 (1868). Contra. Promised "the plaintiff" is good, without adding "to pay the plaintiff." Royle v. Bagshaw, Cro. Eliz. 149 (1589).

† It must be alleged that the defendant made the promise. Law v. Sanders, Cro. Eliz. 913 (1603); Copes v. Matthews, 10 Smedes & M. (Miss.) 398 (1848).

[41] Most of the statement of facts and part of the opinion omitted.

complain that the lozenges were not delivered according to contract, but admits that they were so, but the plaintiff has set out that part of the contract which he alleges the defendant has broken, and all for which he seeks to recover damage, and that is enough. Colburn v. Pomeroy, 44 N. H. 19, and the cases cited are to the point that the consideration moving from the plaintiff, which is set up as the ground of the defendant's promise, must be fully stated, and must be proved as alleged, and is fully in accordance with the above rule.

Alvord v. Smith, 5 Pick. 232, is a case in point. There the plaintiff alleged that in consideration of his having transferred to defendants certain stock in a certain company, the defendants promised to pay all arrearages that then were or might become due from him to the company, and alleged a breach of this promise. On trial it was proved that in consideration of the transferring of the stock by plaintiff, defendants promised not only to pay all arrearages that then were or might become due from him to the company, but also to pay him one hundred dollars. But the court say this is no variance, because the one hundred dollars may have been paid, at least it is not claimed in this action. In this respect such actions are like actions of covenants, where, though there may be many covenants in the deed, the plaintiff may sue for the breach of either one alone.

In Greenl. Ev. §§ 67 and 68, this distinction is clearly stated, and corresponds with the above rule.

Judgment on the verdict.[42]

JAMES & MITCHELL v. ADAMS.

(Supreme Court of Appeals of West Virginia, 1880. 16 W. Va. 245.)

GREEN, P., furnishes the following statement of the case:

It is an action of assumpsit brought in the circuit court of Wood county, by the plaintiffs, James and Mitchell, against the defendant, Adams, for his refusal to accept and pay for certain goods, etc., which by a special contract had been sold to him by them. On the first trial of the case the jury found a verdict for the plaintiffs for $1,000.00; and the court refused to grant a new trial and entered up a judgment pursuant to the verdict. The defendant obtained a writ of error to this court; and the judgment of the circuit court was reversed, a new trial awarded, and case remanded to the circuit court, and the plaintiff permitted to amend his declaration. See 8

[42] Cotterill v. Cuff, 4 Taunt. 285 (1812); Curley v. Dean, 4 Conn. 259, 264, 10 Am. Dec. 140 (1822); Shea v. Kerr, 1 Pennewill (Del.) 530, 43 Atl. 843 (1899); Alvord v. Smith, 5 Pick. (Mass.) 232 (1827); Ammel v. Noonar, 50 Vt. 402 (1878). Accord. King v. Robinson, Cro. Eliz. 79 (1587); Anonymous, Godbolt, 154 (1608); Powel v. Waterhouse, Aleyn, 5 (1647); Crawford v. Morrell, 8 Johns. (N. Y.) 253 (1811). Contra.

W. Va. 568. * * * This was done, there being in the amended declaration three special counts and the common counts.

The first special count, after reciting that the plaintiffs were merchants engaged in selling dry goods in Parkersburg, states that they made a contract of sale with the defendant in September, 1871, and that in the sale was included: First—The entire stock of goods contained in their store which might be in their store on January 1, 1872, when the property sold was to be delivered; Second—A thousand dollars worth of dry goods not then in the store but which had been bought and were en route from the east; Third—The plaintiffs were to be permitted to keep up their stock of staple goods; Fourth —They were required to run down the stock of goods as low as possible by January 1, 1872; Fifth—The defendant was then to pay cost prices for the goods, $1,000.00 in cash and the residue in six and twelve months from that time. The plaintiffs allege that they performed all that was required of them under this contract, and offered to deliver these goods to the defendant on January 1, 1872, and incurred a cost of $100 in making an inventory preparatory to delivering these goods.

The second count describes the property sold differently, as, First —All the dry goods in the store on January 1, 1872; Second—The unexpired term of the lease of said store. It also differs in not alleging that by the original contract the plaintiffs were to run down by January 1, 1872, the stock of goods as low as possible, but states that by a modification of the contract, made December 1, 1871, this was to be done by selling off the goods at cost prices.

The third count is also the same as the first except that the description of the property sold is, First—All the dry goods in the store on January 1, 1872; Second—The $1,000.00 of new dry goods then en route from the east. As the breach of the contract by the defendant the first count alleges, that the plaintiffs tendered the goods on January 1, 1872, and the defendant refused to accept or receive them. There are no damages laid at the end of this count. In the second and third counts the breach is the same, except it includes that defendant refused to pay for the goods; and damages are laid at the close of these counts. The common counts concluded in the usual manner, thus: "And whereas the defendant afterwards, to wit, on the 5th day of January, 1872, at the county aforesaid, in consideration of the premises respectively then and there promised to pay the said several sums of money respectively to the plaintiffs on request, yet the said defendant has disregarded his said promise and has not paid the said sums of money or any part thereof to the said plaintiffs, or either of them, although often requested so to do, to the damage of the plaintiffs $2,000.00. And therefore they bring this suit."

To this declaration and each count thereof the defendant demurred, the court overruled the demurrer, and the defendant pleaded non assumpsit. The jury found a verdict for the plaintiff and assessed

the damages at $940.00 with interest from January 1, 1872. The court overruled a motion for a new trial made by the defendant's counsel, and rendered judgment pursuant to this verdict, to which the defendant's counsel excepted, and the court certified all the evidence in the case. * * *

The following eight instructions, numbered from two to nine inclusive, were given by the court at the defendant's instance, and were not excepted to by the plaintiffs' counsel: * * *

"5th. That if the jury believe from the evidence that at the time of making of the original contract for the sale and purchase of said goods, the defendant agreed to give his notes or a note for the deferred payment or payments beyond the sum of $1,000.00, then the contract is not proven as alleged in the declaration, and the plaintiffs are not entitled to recover.

"6th. That if the jury believe from the evidence that by the terms of the original contract the defendant agreed to pay to the plaintiffs on or about the 1st day of January, 1872, for the stock of goods in the declaration mentioned $1,000.00 cash in hand and the balance in six and twelve months therefrom, and that afterwards said contract was modified so that the defendant and the plaintiffs agreed that the defendant should give his notes for said deferred payments, then the plaintiffs are not entitled to recover, because said modification is not alleged in the declaration. * * *

GREEN, P.,[43] delivered the opinion of the Court: * * * The circuit court erred in refusing on the motion of the defendant's counsel, after all the plaintiff's evidence had been introduced, to exclude from the jury all this evidence, because the contract proven thereby was materially variant from the contract alleged and set forth in any count in the plaintiff's declaration. In this case, when formerly before this Court, it was decided, that in actions founded on special contracts to recover damages for the failure and refusal to perform the same, generally the entire consideration must be stated, and the entire act to be done in virtue of such consideration; and that generally in actions on special contracts, if any part of the contract vary materially from that which is stated in the declaration, it will be fatal, a contract being an entire thing; and if the contract proven is materially variant from that described in the declaration, on the motion of the defendant's counsel at the close of the plaintiff's evidence it should all be excluded from the jury, but to justify such exclusion the variance must be manifest, when viewed in a light

[43] Parts of the statement of facts and of the opinion are omitted. The court held, in the portions of the opinion omitted, that the special counts were defective for reasons discussed in later cases in this section; that the defendant's promise was not such as would warrant recovery on the common counts; that therefore the case must be reversed. They also pointed out other errors to guide the court upon a new trial. The part of the opinion printed concerns these other errors.

most favorable to the plaintiff, as on a demurrer to evidence by the defendant. See 8 W. Va. 568.

I will by reference to some adjudged cases illustrate what is meant under this general rule by materially variant. The following are instances where the variance was deemed material: When the promise was stated to take away the potatoes in a reasonable time, and the proof was they were to be taken away within a month. Hare v. Milner, 1 Peake, 42. So when the declaration stated that the purchaser should make a deposit of £——— (not stating the amount) and the proof was the deposit was to be ten per cent. Merters v. Adcock, 4 Esp. 251. The following are instances in which the variance was adjudged not material or fatal. * * * In Gladstone v. Neale, 13 East, 410, * * * the declaration described the article sold and to be delivered to be eight tons of hemp. It was proven that the article sold was about eight tons of hemp, and when weighed it turned out to be just eight tons; and therefore the court held that the contract in effect was for the sale of that precise quantity, and there was therefore no variance between the declaration and the proof. In Welch v. Fisher, 8 Taunt. 338 (4 E. C. L. 122), the sale was of the stock of a soap-boiler at a valuation, which the declaration alleged had been made and amounted to a certain sum, but the proof showed that in the valuation certain pans were valued as sound, but if on the first boiling in them it turned out that any of them were unsound, a deduction was to be made from the valuation, and there was no proof that any of them were unsound. The court held that there was no material variation between the declaration and the proof.

Within the spirit of these decisions, if there be a material variation in describing the articles sold between the declaration and the proof, such variation would be held material and fatal to the suit. A comparison of the property sold as stated in each of the several special counts with the property, which the proof showed was contracted to be sold in the case now before the court, will show that they are materially variant. A material portion of the property actually sold, as shown by the proof, being omitted in each of the special counts. No one of the special counts states all the property which the proof shows was sold; and each of them was therefore fatally defective as a basis on which a verdict could be rendered for the plaintiffs, though all the property sold was set out in the declaration, some in one count and some in another. But the statements in one count cannot supply the defects in another, each being treated as a separate cause of action. The court ought therefore to have excluded the plaintiffs' evidence from the jury.[44] But, though the dec-

[44] Leeds v. Burrows, 12 East, 1 (1810); Cross v. Bartlett, 3 M. & P. 537 (1829); Carrell v. Collins, 2 Bibb (Ky.) 429 (1810); Bromley v. Goff, 75 Mich. 213, 42 N. W. 810 (1889); Colburn v. Pomeroy, 44 N. H. 19 (1862); Lowrie v. Brooks, 1 Nott & McC. (S. C.) 342 (1818). Accord.

If the proof of consideration is variant in some other respect from the allegation, the rule is the same. Francam v. Foster, Skin. 326 (1693); Van-

laration stated that the excess of the cost-value of the goods exceeding $1,000.00 was to be paid by the defendant in six and twelve months, and did not say that the defendant was to execute his notes therefor to the plaintiffs, and the proof was that by the contract he was to execute such notes for the deferred payments, yet this would not be a material variance or fatal to the plaintiffs' case, for the agreement to give the notes is a mere stipulation that certain evidence should be furnished of the obligation of the defendant under the contract; and whether they were to be given or not would in no manner alter or change the real and substantial liability of the defendant under the contract. Within the spirit of the above decisions even a misdescription in the declaration of the time, in which these notes were to be paid, would not have been fatal to the plaintiff's cause, for if, as alleged in the declaration, the defendant refused to accept the goods or make the cash payment, and thus repudiated the entire contract, he would be as much liable, if the notes to be given were payable at one time in the future as at another, the time in which they were to be paid being thus immaterial, as stated in the special counts in the declaration, it need not to have been alleged in the declaration, and if alleged, need not be proven as alleged, though the defendant might defend himself by proving that he would not accept the goods, because their tender was accompanied by the demand for notes for the deferred payments payable at a different time from that agreed upon when the contract of sale was made. The fifth and sixth instructions asked for by the defendant ought not to be again given, if objected to by the plaintiff, as they do not lay down the law correctly.[45] * * *

The other judges concurred.

Judgment reversed. Cause remanded.

sandau v. Burt, 5 B. & Ald. 42 (1821); Fay v. Hall, 25 Ala. 704 (1854); Curley v. Dean, 4 Conn. 259, 265, 10 Am. Dec. 140 (1822); Colt v. Root, 17 Mass. 229 (1821); Keyes v. Dearborn, 12 N. H. 52 (1841); Stone v. Knowlton, 3 Wend. (N. Y.) 374 (1829); McMillan v. Theaker, 12 Ohio, 24 (1843); Cunningham v. Shaw, 7 Pa. 401 (1847); Harris v. Harris, 23 Va. 431 (1824). Accord. Hands v. Burton, 9 East, 349 (1808); Dox v. Dey, 3 Wend. (N. Y.) 356 (1829). Contra.

[45] An allegation of the consideration is necessary. Leneret v. Rivet, Cro. Jac. 503 (1619); Elsee v. Gatward, 5 T. R. 143 (1793); Russell v. Slade, 12 Conn. 455 (1838); Connolly v. Cottle, 1 Ill. 364 (1830); Wright v. Gilbert, 51 Md. 146 (1879); Murdock v. Caldwell, 2 Allen (Mass.) 309 (1864); Bailey v. Freeman, 4 Johns. (N. Y.) 280 (1809); Southern Ry. Co. v. Willcox, 98 Va. 222, 35 S. E. 355 (1900); Grover v. Ohio River R. Co., 53 W. Va. 103, 44 S. E. 147 (1903).

Allegations insufficient to show prima facie a consideration are as bad as none. Lee v. Mynne, Cro. Jac. 110 (1606); Powell v. Brown, 3 Johns. (N. Y.) 100 (1808); Harding v. Cragie, 8 Vt. 501 (1836).

If the consideration alleged is past, it must be alleged to have been given at request. Hayes v. Warren, 2 Str. 932 (1732); Jewett v. Somerset County, 1 Me. 125 (1820) semble; Comstock v. Smith, 7 Johns. (N. Y.) 87 (1810); Parker v. Crane, 6 Wend. (N. Y.) 647 (1831); Stoever v. Stoever, 9 Serg. & R. (Pa.) 434, 454 (1823) semble.

It has been held that it must expressly appear that the consideration and

WICKLIFFE v. HILL.

(Court of Appeals of Kentucky, 1815. 4 Bibb, 269.)

BOYLE, C. J. This case was formerly before this Court upon a writ of error, when the judgment was reversed because the declaration contained no averment of the consideration upon which the promise or agreement declared on was founded; and the cause being remanded, the declaration was amended in this respect, so as to allege in substance that the promise or agreement was made upon a valuable consideration, but without stating what the consideration was. To the amended declaration the defendant demurred, and pleaded non assumpsit. The demurrer was overruled, and a verdict found for the plaintiff upon the issue joined upon the plea. Whereupon a judgment was given for the damages assessed by the jury, to which this writ of error is prosecuted by the defendant.

Whether an averment that the promise was made for a valuable consideration, without setting forth the consideration, would be good after verdict, is a point which need not in this case be decided, since the question occurred upon a demurrer which was not afterward waived by the party. And most clearly such an averment is insufficient upon a demurrer; for it is well settled, that wherever a consideration is necessary to be alleged, it should be set forth at least in such general terms that the Court might be able to judge whether it was a legal consideration and sufficient to support the promise or agreement declared on.

The judgment must, therefore, be reversed with costs, and the cause remanded for new proceedings not inconsistent with the foregoing opinion.[46]

LANSING v. McKILLIP.

(Supreme Court of New York, 1805. 3 Caines, 286.)

Assumpsit, on a special agreement in consideration of a horse, and divers goods and merchandises, to deliver, for value received, forty dollars worth of merchantable boards.

At the trial the plaintiff adduced the subscribing witness to the note, who testified that the horse was the only consideration. Upon this the defendant moved for a nonsuit, insisting that the plaintiff was bound to prove all the several considerations, as laid. The

promise were exchanged. Whitall v. Morse, 5 Serg. & R. (Pa.) 358 (1819); People's Bank v. Adams, 43 Vt. 195 (1870).

[46] Andrews v. Whitehead, 13 East, 102 (1810); Winne v. Colorado Springs Co., 3 Colo. 155 (1877); Rossiter v. Marsh, 4 Conn. 196 (1822) semble; Beauchamp v. Bosworth, 3 Bibb (Ky.) 115 (1813); Kean v. Mitchell, 13 Mich. 207 (1865) semble; McKee v. Bartley, 9 Pa. 189 (1848) semble; Marshall v. Aiken, 25 Vt. 328 (1853); Crawford v. Daigh, 4 Va. 521 (1826) semble. Accord.

judge, ruling to the contrary, charged in favor of the plaintiff, for whom the jury found. The application now was to set aside that verdict.

SPENCER, J.[47] If the averment of a consideration on a note like the one in this case was necessary, then the plaintiff, by averring a consideration which did not exist, has failed in his proof; for if two considerations be alleged as the foundation of a promise, both must be proved. Cro. Jac. 503; Esp. Dig. 133, 139. If, however, the admission of value by this paper is of itself sufficient, then the averment of a consideration would be surplusage, and might have been struck out on motion, and therefore cannot vitiate. Doug. 666.

That the present is not a promissory note within the statute will not be disputed; it is, therefore, a promise which can only be enforced on the ground of a consideration; and though value is admitted to be received, it does not supersede the necessity of averring the consideration, that the court may see that it is of that kind and nature to sustain the promise. Prior to the statute of 3 and 4 Anne, c. 9, no action could be maintained expressly on a note, even for the payment of money, without declaring on it as a special agreement, and setting forth the consideration. The case of Carlos v. Fancourt, 5 D. & E. 482, contains the whole law on this subject; and there the court unanimously held, that in declarations on notes not within the statute, they were to be regarded as special agreements, and the consideration was necessary to be set out. In my opinion, the defendant is entitled to a new trial.

LIVINGSTON, J. This action being brought on a note by which the defendant acknowledges his having received value for the promise he makes, it was not, in my opinion, necessary to prove any consideration, nor should the defendant have been permitted to show that it was incorrectly set forth, unless he were able to impeach it on the ground of fraud, turpitude, or illegality. It is superfluous, as well as dangerous, to require proof of the consideration of an undertaking in writing, when a valuable one is acknowledged under the signature of the party himself. It is asking what rarely can be complied with. How seldom is it that the whole consideration appears on the face of a contract; or that even a subscribing witness knows anything of it; or if he did, how easily might it escape the memory, or such proof be lost, by death or other accident! So long, then, as it is permitted to set up any unlawful consideration, it is all that can reasonably be asked, and no one can complain that his own acknowledgment is regarded as evidence, at least prima facie, of one that is fair and valuable. The motion to non-suit was therefore properly overruled by the Chief Justice; for here was not only a consideration acknowledged under the defendant's hand, but his receipt of a

[47] The concurring opinions of Thompson, J., and Kent, C. J., are omitted, as well as part of the opinion of Livingston, J.

horse actually proved. Under these circumstances, it would be doing great injustice to listen to the present application, merely because an additional consideration alleged in the declaration, which may be regarded as surplusage, and the want of which constituted no defence, could not be proved, or was disproved. No case has yet gone this length, and I should require a series of decisions to satisfy me of the propriety or necessity of so much strictness. * * * I know not of a single decision, rendering it necessary, on a contract of this nature to prove a consideration. * * * I know it to be a general and wholesome principle, that contracts must be made on some consideration, and that ex nudo pacto non oritur actio; but the question still recurs, who is to prove, in a case of this kind, the nakedness of the contract, or its want of consideration? The same law, which requires this quid pro quo in a contract, does not demand an absolute equivalent, but is satisfied, in many cases, with the most trifling ground that can be imagined. Why not then be content, in point of evidence, with a declaration under the hand of the party, that he has received a valuable one, without indulging the useless curiosity of prying further into the transaction? Why so very careful of the defendant's rights as not to suppose him capable of judging for himself what was an adequate value for his promise? Would it not be more just, and better promote the ends of justice, that one who had signed an instrument of this kind should, without further proof, be compelled to perform it, unless he could impeach the validity on other grounds? * * * But without disturbing any of the distinctions, which for ages have existed between these contracts, no adjudged case can be found repugnant to my conclusion. * * * In the case of Carlos v. Fancourt, 5 D. & E. 482, I will only say, that nothing like the present question occurred. The plaintiff had declared on a note of hand, payable on a certain contingency, as on a note within the statute of Anne, and that it was not so was the single point determined. No latitude of expression, therefore, in which the judges may have indulged on points not before them, could have the effect of settling the law, even in England. Unfettered, then, by any decision, as to what shall be received as evidence of the consideration of notes of this description, I have little hesitation in saying that it ought never to be necessary to prove the consideration of a contract, although stated in the declaration, where a party has acknowledged in writing that it was made for value, in any other way than by a production and proof of the instrument itself; and that the defendant ought not to be allowed to show that it was made on any other, unless it be of a nature to destroy, or in any manner affect its validity. This is no more than is done in actions of trover, in which, although a loss and finding be alleged in a declaration, proof of neither is required: where, then, the extravagance of alleging any legal consideration to comply with the usual form of declaring, and letting it be inferred from the production of a note which admits on the face

a valuable one? Good sense would suggest the propriety of going further, and saying that such a note might be declared on as a specialty, without alleging any consideration, only leaving to the defendant the same right of investigating its legality or failure. Such an innovation, however, in the form of declaring, should not be introduced without much deliberation on the consequences it might produce. The plaintiff is, in my opinion, entitled to the postea.

Verdict set aside, and new trial granted.[48]

FERGUSON v. CAPPEAU.

(Court of Appeals of Maryland, 1825. 6 Har. & J. 394.)

Appeal from Baltimore county court. This was an action of assumpsit, instituted by Charles Cappeau, the appellee's intestate, against the appellant, to recover the value of four cases and three bales of dry goods, shipped on board a vessel of the appellant, called the Cecil, by the said intestate, to be transported for freight from Baltimore to Norfolk, and which the declaration alleges were wholly lost by the negligence of the appellant. * * *

BUCHANAN, C. J.,[49] delivered the opinion of the court. * * *

The fourth objection, that there is a variance between the declaration and the contract proved, arises out of the general prayer to the court in each bill of exceptions, to instruct the jury, that the plaintiff was not entitled to recover.

It is a settled rule in pleading, that in an action founded upon a contract, if there be in the contract a proviso or condition which operates only in defeasance of it, or merely respects the liquidation of damages after a right to them has arisen by a breach of the contract, it is not necessary to be stated in the declaration, but should come from the other side; but that if there be a condition precedent, or a proviso or other matter which qualifies the contract, or goes in discharge of the liability of the defendant, it must be stated. * * *

The bill of lading in this case has an exception "of the dangers of the seas," which does not merely respect the amount of damages to be

[48] Jerome v. Whitney, 7 Johns. (N. Y.) 321 (1811). Accord.

It has been held that, if the declaration states that the promise in writing was "for value received," it is good. Jerome v. Whitney, 7 Johns. (N. Y.) 321 (1811); Walrad v. Petrie, 4 Wend. (N. Y.) 575 (1830). Accord. Blanckenhagen v. Blundell, 2 B. & Al. 417 (1819) semble. Contra.

If the declaration simply states that the writing contained the words "for value received," it is bad. Blanckenhagen v. Blundell, 2 B. & Al. 417 (1819); Gains v. Kendrick, 2 Mill, Const. (S. C.) 339 (1818). Accord. Leonard v. Sweetzer, 16 Ohio, 1 (1847: on the ground apparently that consideration is unnecessary for such an instrument). Contra.

In a declaration on a bill or note within the law merchant, no allegation of consideration is necessary. 14 Pl. & Pr. 480; 8 Cyc. 109.

[49] Statement of facts abridged, and part of opinion omitted.

recovered, but it limits and restrains, it changes the general obligation, and qualifies the particular contract, of which it is as much, and as material a part, as any clause in it, and the general obligation being thus restricted, the appellant, as owner, is only answerable on his special undertaking, as evidenced by the bill of lading. What then is that special undertaking? Why, to deliver the goods in good order and condition at the port of Norfolk, the dangers of the seas only excepted; not a general undertaking at all events to deliver them, but only to deliver them, if not prevented by the dangers of the seas, a strictly qualified contract; and the declaration charges a general undertaking to transport the goods safely and securely to Norfolk, and there to deliver them to the appellee, without any restriction or qualification. The plea is non assumpsit, denying the contract as laid in the declaration, against which alone the appellant comes to defend himself, and the bill of lading showing a different and qualified undertaking, is produced in evidence by the appellee.

It is an established general rule, that when the contract proved varies from that stated or described in the declaration, the plaintiff must be nonsuited.

The contract proved here is essentially different from that declared upon, and we think the variance fatal. * * *

Judgment reversed, and procedendo awarded.[50]

INDEPENDENT ORDER OF MUTUAL AID v. PAINE.

(Appellate Court of Illinois, 1885. 17 Ill. App. 572.)

Error to the Circuit Court of La Salle county; the Hon. George W. Stipp, Judge, presiding. Opinion filed December 4, 1885.

Baker, J. This was assumpsit by defendant in error against plaintiff in error, upon a beneficiary certificate issued by the latter and payable to defendant in error, in case of the death of Lucius B. Paine, her husband.

A general demurrer to the declaration was overruled by the court; and, thereupon, a final judgment was rendered in favor of defendant in error for $2,360 and costs.

The circuit court erred in not sustaining the demurrer to the declaration. Where the performance of the defendant's contract depends on some act to be done or forborne by the plaintiff, or on some other event, the plaintiff must aver the fulfillment of such condition precedent, whether it is in the affirmative or negative, or to be performed or observed by the plaintiff or by the defendant or by any other person,

[50] Mustard v. Hopper, Cro. Eliz. 149 (1589); Bunnel v. Taintor, 5 Conn. 273 (1824); Myrick v. Merritt, 22 Fla. 335, 342 (1886); Rockford Ins. Co. v. Nelson, 65 Ill. 415 (1872); Smith v. R. R., 36 N. H. 458, 488, 495 (1858) semble; Trenton City Bridge Co. v. Perdicaris, 29 N. J. Law, 367 (1862); Wilson v. Smith, 5 Yerg. (Tenn.) 379, 400 (1825). Accord.

or must show some excuse for the non-performance.[51] 1 Chitty, Pl. pp. 320 and 321; People v. Glann, 70 Ill. 232. In this case, by the terms of the contract, the sum insured was payable only upon due notice and satisfactory proof of the death of Lucius B. Paine; and it does not appear from the declaration that proofs of death were either furnished or waived. So, also, the averments in the declaration show that the promise of plaintiff in error was to pay the $2,000, upon the surrender of the beneficiary certificate, legally receipted; but the declaration fails to allege either such surrender, or an offer or readiness to surrender, or any matter of excuse. The rule of pleading is, that where there are mutual conditions to be performed at the same time, the plaintiff must aver performance or a readiness to perform his or her part of the contract.[52] 1 Chitty, Pl. pp. 321 and 322. In the

[51] The cases accord are numerous. See 9 Cyc. 719, 722; 4 Pl. & Pr. 628. The rule applies to express conditions. Fay v. Hall, 25 Ala. 704 (1854); Myrick v. Merritt, 22 Fla. 335, 342 (1886); Meyers v. Phillips, 72 Ill. 460 (1874). To conditions implied by law from the promise of the plaintiff. Carrell v. Collins, 2 Bibb (Ky.) 429 (1811); Murdock v. Caldwell, 8 Allen (Mass.) 309 (1864: both express and implied); Carroll County v. Collier, 63 Va. 302 (1872). To conditions imposed by law independent of anything contained in the plaintiff's promise. Stephens v. De Medina, 4 Q. B. 422 (1843: that buyer prepare and tender a conveyance); Bank v. Ellis, 161 Pa. 241, 28 Atl. 1082 (1894: presentment and notice to charge an indorser); James v. Adams, 16 W. Va. 245, 258 (1880: notice required because plaintiff had better information than defendant). Also to conditions not to be performed by the plaintiff. Kingsley v. Bill, 9 Mass. 198 (1812); Bruen v. Ogden, 18 N. J. Law, 124 (1840).

When request is really a condition precedent, the allegation "although often requested" will not suffice. Selman v. King, Cro. Jac. 183 (1608); Bach v. Owen, 5 T. R. 409 (1793); Byrd v. Cummins, 3 Ark. 592 (1841). Accord. But see Forrest v. Jones, 7 Ala. 493 (1845).

[52] The cases to this effect are also numerous. See 6 Pl. & Pr. 636; 9 Cyc. 720, 723.

The plaintiff must allege, not merely readiness and willingness to perform, but an offer to perform. Sanford v. Cloud, 17 Fla. 532, 549 (1880: covenant); Caldwell v. Richmond, 64 Ill. 30 (1872: debt on a specialty) semble; Van Kirk v. Talbot, 4 Blackf. (Ind.) 367 (1837: covenant); Kendal v. Talbot, 2 Bibb (Ky.) 614 (1812: covenant); McChord v. Tomlin, 3 Dana (Ky.) 144 (1835); Kane v. Hood, 13 Pick. (Mass.) 281 (1832); Ackley v. Richman, 10 N. J. Law, 304 (1829); Chew v. Egbert, 14 N. J. Law, 446 (1834); Green v. Reynolds, 2 Johns. (N. Y.) 207 (1807: covenant); Johnson v. Wygant, 11 Wend. (N. Y.) 48 (1833: covenant); Williams v. Healey, 3 Denio (N. Y.) 363 (1846: covenant); Campbell v. Gittings, 19 Ohio, 347 (1850: required not only offer, but tender); Jones v. Marsh, 22 Vt. 144, 148 (1850) semble; Robertson v. Robertson, 24 Va. 68 (1824: covenant). Accord. Levy v. Ld. Herbert, 7 Taun. 314 (1817: but declaration alleged defendant's refusal); Boyd v. Lett, 1 C. B. 222 (1845: but declaration alleged notice to defendant of plaintiff's readiness and willingness); Low v. Marshall, 17 Me. 232 (1840: under allegation of readiness and willingness must prove offer; debt on specialty) semble; North v. Pepper, 21 Wend. (N. Y.) 636 (1839: same as last, except covenant) semble; Robinson v. Tyson, 46 Pa. 286, 292 (1863: possibly also requiring demand that defendant perform); Moss v. Stipp, 17 Va. 159 (1811.) Contra. The following cases, often also cited as contra, seem distinguishable: Rawson v. Johnson, 1 East, 203 (1801: leading case); Waterhouse v. Skinner, 2 B. & P. 447 (1801); Bristow v. Waddington, 2 B. & P. N. R. 355 (1806); Jackson v. Alloway, 6 M. & G. 942 (1844); Smith v. Lewis, 26 Conn. 110, 118 (1857); Funk v. Hough, 29 Ill. 145 (1862); West v. Emmons, 5 Johns. (N. Y.) 179 (1809).

case of Mass. Mut. Life Ins. Co. v. Kellogg, 82 Ill. 614, it is held, that in order to sustain an action on a life insurance policy, upon general demurrer, or motion in arrest, or on error, the declaration must show the making of the policy, the conditions of the contract, the performance of all conditions that plaintiff is bound to show were performed and the happening of the contingencies upon which defendant becomes liable to pay, and the failure of defendant to pay.

For the error indicated, the judgment is reversed, and the cause remanded, with instructions to sustain the demurrer to the declaration.

Reversed and remanded.[53]

PARKER v. PALMER.

(Court of King's Bench, 1821. 4 Barn. & Ald. 387.)

Declaration stated, that defendant bargained for and bought of the plaintiffs; and the plaintiffs, at the request of the defendant, sold to the defendant a certain quantity, viz. 1,826 bags of East India rice, at the rate of 13s. 6d. for each and every hundred pounds' weight thereof, according to the conditions of sale of the East India Company, prompt in three months, deposit £10. per cent., to be put up at the next East India Company's sale by the proprietors, if required, and in consideration of the premises and that plaintiffs, at the request of the defendant, had undertaken and faithfully promised to deliver to the defendant the rice, upon the terms and conditions aforesaid, when they should be requested; the defendant undertook to accept the rice of plaintiffs, and to pay them for the same. Breach, that the defendant, although requested, and although the time for the defendant to have accepted and paid for the rice, upon the terms and conditions aforesaid, had long since elapsed, had not accepted the same. Counts for goods sold and delivered, goods bargained and sold. Plea, non assumpsit.

At the trial before Abbott, C. J., at the London sittings after last Michaelmas term, it appeared that the plaintiffs, merchants in London, had employed Dubuisson and Co., brokers, to sell a quantity of East

[53] Pierson v. Springfield Fire & Marine Ins. Co., 7 Houst. (Del.) 307, 310, 323, 31 Atl. 966 (1885: court evenly divided); Dolbier v. Insurance Co., 67 Me. 180 (1877); St. Louis Co. v. Kyle, 11 Mo. 278, 289, 49 Am. Dec. 74 (1848: covenant—held allegation must be proved); Inman v. Western Fire Ins. Co., 12 Wend. (N. Y.) 452 (1834: covenant); Farrell v. American Employers' Liability Co., 68 Vt. 136, 143, 34 Atl. 478 (1896) semble; Quarrier v. Ins. Co., 10 W. Va. 507, 524, 27 Am. Rep. 582 (1877). Accord.

So the plaintiff must allege the payment of premiums. Farrell v. American Employers' Liability Co., 68 Vt. 136, 143, 34 Atl. 478 (1896: at least held plaintiff must prove it). Accord. Assembly v. McDonald, 59 N. J. Law, 248, 35 Atl. 1063 (1896: under statute). Contra.

So the plaintiff must allege compliance with a condition precedent for arbitration. Lamson v. Ins. Co., 171 Mass. 433, 50 N. E. 943 (1898).

He must also allege a loss within the terms of the policy. Louisville Ins. Co. v. Bland, 9 Dana (Ky.) 143 (1839) semble.

India rice, and that they, in pursuance thereof, on the 15th of May, 1820, sold to the defendant a quantity of rice under the following contract: "Bought, by order and for account of Mr. A. Palmer, of Messrs. Parker and Co., ex Hadlow, per sample, 1,826 bags East India rice, at 13s. 6d. per cwt., Company's conditions, prompt three months, deposit £10. per cent., to be put up at the next East India sale by the proprietors, if required." * * *

It was objected at the trial that there was a variance in the contract declared on and that given in evidence; inasmuch as the latter was a contract for rice per sample, whereas the contract stated in the declaration was for rice generally. The Lord Chief Justice overruled the objection, but gave the defendant leave to move to enter a nonsuit. * * *

The verdict was found for the plaintiffs; and a rule nisi for entering a nonsuit or a new trial having been obtained, on the objections taken at the trial in last Hilary term.

ABBOTT, C. J.[54] I am clearly of opinion, that there ought not, in this case, to be a nonsuit on the ground of variance. The words per sample, introduced into this contract, may be considered to have the same effect as if the seller had, in express terms, warranted that the goods sold should answer the description of a small parcel exhibited at the time of the sale. Now if there had been such an express warranty in this case, I should be of opinion that the plaintiff would not be bound to set it out in his declaration, for he is only bound to set out the contract for the breach of which he declares. The words per sample are not a description of the commodity sold, but a mere collateral engagement on the part of the seller, that it shall be of a particular quality; the breach of that engagement may furnish a matter of defense to the defendant, but the plaintiff does not rely on it, and need not state it in his declaration. * * * I think, therefore, that there is no ground either for a nonsuit or a new trial, and that this rule ought to be discharged.

Rule discharged.[55]

[54] Statement of facts abridged, and parts of the opinion of Abbott, C. J., as well as of the concurring opinions of Holroyd and Best, JJ., are omitted.

[55] Clark v. Grey, 6 East, 564 (1805); McRae v. Raser, 9 Port. (Ala.) 122 (1839); Brenan v. Shelton, 2 Bailey (S. C.) 152 (1831); Buckstaff v. Russell, 151 U. S. 626, 632, 14 Sup. Ct. 448, 38 L. Ed. 292 (1893). Accord.

The same rule applies to conditions subsequent in form, though precedent in effect. Welch v. Fisher, 8 Taun. 338 (1818); Jones v. Clark, 3 Q. B. 194 (1842). Apparently also to real conditions subsequent. Rockford Ins. Co. v. Nelson, 65 Ill. 415 (1872) semble; Ferguson v. Cappeau, 6 Har. & J. (Md.) 394, 401 (1825) semble.

These questions have arisen most often in connection with suits on insurance policies, and the authorities there sustain the same principles. Lounsbury v. Insurance Co., 8 Conn. 459, 466, 21 Am. Dec. 686 (1831: conditions subsequent in form and provisos); Jacobs v. Insurance Co., 1 McArthur (D. C.) 632, 639 (1874: statements in application); Tillis v. Insurance Co., 46 Fla. 268, 277, 35 South. 171, 110 Am. St. Rep. 89 (1903: condition subsequent in

KERN v. ZEIGLER.

(Supreme Court of Appeals of West Virginia, 1878. 13 W. Va. 707.)

JOHNSON, J., delivered the opinion of the Court: [56]

The only questions, presented in this case, arise on the demurrer to the declaration, and to each count thereof. * * *

It is here objected, that the first count is fatally defective, "because the allegation of performance of the covenant on the part of the plaintiff is general." It is insisted, that the declaration on its face should have pointed out specifically the time and manner, in which the plaintiff had performed his covenants.

In some of the States it has been held, that an allegation of general performance by the plaintiff is insufficient; but in England it is held that such allegation of performance is sufficient. 3 Rob. Prac. 578, and cases cited. Mr. Robinson, p. 578, says: "It is not denied in New York, that, when a condition precedent lies by the covenant itself in a definite and certain form, so definite, that it need not be made more certain for the purpose of pleading, then it is enough to say generally, that the party has performed it, according to the intent and meaning of the agreement, if the conditions, as contained in that, were fully stated; and so of any number of acts by way of precedent condition. Wright v. Tuttle, 4 Day (Conn.) 313; Glover v. Tuck, 24 Wend. (N. Y.) 162. But this it is said by Cowen, Judge, is rarely so." In New York in a number of cases it has been held, that it is not enough to allege performance generally. In Virginia, as far as I have been able to find, there has been no adjudication of this precise question; and the question has never been passed upon by this Court.

While it is a general rule in pleading, that whatever facts are necessary to constitute the cause of action must be directly and distinctly stated, yet there has been much controversy as to the particularity, with which such facts should be stated. * * *

We think even at common law, where the declaration sets forth par-

form, iron safe clause; covenant); Howard Co. v. Cornick, 24 Ill. 455 (1860: condition subsequent in form for replacing property; covenant); Ætna Co. v. Phelps, 27 Ill. 71, 81 Am. Dec. 217 (1862: same as last); Herron v. Insurance Co., 28 Ill. 235, 81 Am. Dec. 272 (1862: statements in application; covenant); Clay Ins. Co. v. Wusterhausen, 75 Ill. 285 (1874: condition subsequent in form as to change of title; covenant); Knickerbocker Co. v. Tolman, 80 Ill. 106 (1875: proviso as to other insurance); Continental Co. v. Rogers, 119 Ill. 474, 485, 10 N. E. 242, 59 Am. Rep. 810 (1887: warranties, representations, etc.) semble; Forbes v. Insurance Co., 15 Gray (Mass.) 249, 257, 77 Am. Dec. 360 (1860: conditions subsequent, applies generally); Whipple v. United Fire Ins. Co., 20 R. I. 260, 38 Atl. 498 (1897: same as last); London & L. Fire Ins. Co. v. Crunk, 91 Tenn. 376, 23 S. W. 140 (1892: condition subsequent in form as to falling of building); Cooledge v. Continental Ins. Co., 67 Vt. 14, 30 Atl. 798 (1894: generally, on ground that are provisos); Powers v. Insurance Co., 68 Vt. 390, 35 Atl. 331 (1896: generally on ground that are conditions subsequent).

[56] Statement of facts and part of opinion omitted.

ticularly, what the plaintiff was required to do by the covenant, and those things are matters of fact only, that an allegation in general form, that the plaintiff "has performed all things by the covenant required of him, according to the tenor and effect thereof," is sufficient: that in a case of this kind the objection is to the form, and not to the substance, of the declaration.

In Varley v. Manton, 9 Bing. 363, it was held, that pleading a general covenant [averment] of performance "according to the provisions of the said agreement" is sufficient, on general demurrer, although the agreement contains conditions precedent, specific averment of the performance of which would have been indispensable, on special demurrer.

Tindal, C. J., said: "We must take the words of the averment of performance, as they would strike any ordinary person. According to the provisions of the said agreement, it overrides the whole of the preceding averments; and it would be a violent construction to confine it to the last member of the sentence. That brings the case within the rule, that where there is a general allegation of performance, if the other party wants a more specific averment, he must demur specially."

Special demurrers were abolished by the Code of 1849, by the following provision: "On a demurrer, (unless it be a plea in abatement,) the court shall not regard any defect or imperfection in the declaration or pleadings, whether it has been heretofore deemed mispleading or insufficint pleading, or not unless there be omitted something, so essential to the action or defense, that judgment according to law and the very right of the cause, cannot be given." This provision has been the law in Virginia and this State ever since the adoption of the Code of 1849. It has been construed in the following as well as other cases; Smith's Adm'r v. Lloyd's Ex'r, 16 Grat. 295; Coyle v. B. & O. R., 11 W. Va. 94. * * *

In applying the law to each particular case, the court must determine, whether the objection is to the mere form, or to the substance, of the declaration. If it is to the form merely, since the statute abolished special demurrers, the declaration would be held good; but if it is to the substance, and there is omitted something so essential to the action or defense that judgment according to law and the very right of the case cannot be given, a general demurrer would be sustained.

It is manifest to me, that the objection to the first count is to the form, thereof, and not to the substance. The pleader was required to show, that the plaintiff had performed, what was required of him, before he could require of the other party to perform his part of the agreement, covenants being dependent. This he has done, by setting out specifically the agreement, and specifically, what it required him to do, and a general allegation, that "he performed and complied with all the several matters and things, by and under the said indenture to be performed and complied with on his part, according to the tenor and effect of the said indenture." There is certainly nothing omitted here

so essential to the action, that judgment according to law and the very right of the case could not be given.

The demurrer to the first count was properly overruled.[57]

In the second count there is not even a general allegation of performance, but that he was at Bellaire on the day the contract was to be performed, and was ready and willing to convey &c., but that he was prevented from so doing by failure of the defendant to be there on that day, and that the defendant was on that day absent from the State of Ohio, and in the State of West Virginia, where he resided, &c.

The covenants, declared on, are clearly dependent; and unless the excuse for not performing is valid, the count is clearly bad. Roach v. Dickinson, 9 Grat. 154. In Clark v. Franklin, 7 Leigh, 7, Tucker, President, said: "Nothing is more true, than that, where a contract is entire, and the covenants are dependent, the plaintiff is in general obliged to aver and prove a complete performance of all that was to be done and performed on his part, before he is entitled to demand payment from the other party. But to this well established rule, there is the equally well established exception, that, where the defendant has prevented a performance by the plaintiff on his part, it is not necessary, that the plaintiff should aver or prove a complete performance, to entitle him to his action. He may recover without doing so; and it is sufficient to show a readiness to perform and that he was hindered by the defendant." Gas Co. v. Wheeling, 8 W. Va. 369, opinion of Haymond, Judge; Smith v. Lewis, 24 Conn. 624, 63 Am. Dec. 180; Borden v. Borden, 5 Mass. 67, 4 Am. Dec. 32; Smith v. Smith, 25 Wend. (N. Y.) 405.

The circumstances surrounding this case show, that it was to be performed in Bellaire, in the State of Ohio, where it was made. Pugh v. Cameron's Adm'r, 11 W. Va. 523. It was the duty of the defendant to be at that place, on that day, to accept the deed and wagon, and pay the money, and execute the notes, &c. His absence from the State that day excused the plaintiff from performance on his part of the agreement, if he was then ready and willing to perform. Smith v. Smith, 25 Wend. (N. Y.) 405; Tasker v. Bartlett, 5 Cush. (Mass.) 359; Fessard v. Mugnier, 114 Eng. C. L. 284. It was not the duty of the plaintiff, to follow the defendant out of the State, to make a tender

[57] Vivian v. Shipping, Cro. Car. 384 (1635); Thorp v. Thorp, 12 Mod. 455 (1701); Varley v. Manton, 9 Bing. 363 (1832); Manby v. Cremonini, 6 Ex. 808 (1851); Wright v. Tuttle, 4 Day (Conn.) 313 (1810: unless act to be done involves questions of law: covenant). Accord. Alexander v. Wales, 6 T. B. Mon. (Ky.) 323 (1827: covenant); Ridgway v. Forsyth, 7 N. J. Law, 98 (1823: where act to be done involves questions of law; covenant); Pennsylvania Co. v. Webb, 9 Ohio, 136 (1839); Hart v. Rose, Fed. Cas. No. 6,154a (1834: covenant); Barbee v. Willard, Fed. Cas. No. 969 (1848). Contra.

A general allegation of performance is bad on special demurrer. Vivian v. Shipping, Cro. Car. 384 (1635) semble; Varley v. Manton, 9 Bing. 363 (1832) semble; People v. Glann, 70 Ill. 232 (1873: mandamus); Glover v. Tuck, 24 Wend. (N. Y.) 153, 160 (1840: unless condition or conditions simple and specific; covenant); Woonsocket Co. v. Taft, 8 R. I. 411 (1867). Accord.

of the deed and wagon. The second count is therefore good and the demurrer thereto was properly overruled.[58]

The third count being abandoned before the trial, and all the others being good, the demurrer was as to the whole declaration properly overruled.

There being no error in the record, the judgment of the court is affirmed with costs and damages. The other Judges concurred.

Judgment affirmed.

SPANN v. BALTZELL.

(Supreme Court of Florida, 1847. 1 Fla. 301, 46 Am. Dec. 346.)

HAWKINS, J.[59] Error from Franklin Superior Court. Action was brought in the Court below, by Baltzell against Spann, under an attachment for $1400, and the declaration was in assumpsit, on the following promissory note against Spann, as endorser:

"Apalachicola, Dec'r 3d, 1840.

"By the 22d of May, 1842, I promise to pay to the order of L. M. Stone, at the Agency of the Southern Life Insurance and Trust Company Bank, Apalachicola, fourteen hundred dollars, for value received. James H. Campbell."

Endorsed: "L. M. Stone.
"Josiah S. Patterson.
"S. Scarborough.
"Rich'd C. Spann."

Baltzell sued as the immediate endorsee of Spann. The declaration avers, that at the time the note became due and payable, according to its tenor and effect, it was duly presented for payment at the Agency of the Southern Life Insurance and Trust Company at Apalachicola, but that payment was refused; of all which the defendant had due notice. * * *

The Court charged the jury: * * *

"4th. If a bank, at which a note is so payable, and which note is so holden by another person than such bank, has quit doing business, and a demand is made at the former place of business of said bank of the former Cashier thereof, and who has ceased to be such Cashier, such demand is sufficient in law to entitle the holder of such note to

[58] Ferry v. Williams, 8 Taun. 62, 70 (1817); Smith v. Lewis, 26 Conn. 110, 118 (1857); Breckenridge v. Lee, 3 Bibb (Ky.) 329 (1814: covenant); Hilt v. Campbell, 6 Me. 109 (1829) semble; Newcomb v. Brackett, 16 Mass. 161 (1819); Little v. Mercer, 9 Mo. 218, 223 (1845: debt on a specialty); Potts v. Point Pleasant Land Co., 49 N. J. Law, 411, 415, 8 Atl. 109 (1887: covenant); North v. Pepper, 21 Wend. (N. Y.) 636 (1839: covenant); Clark v. Franklin, 7 Leigh (Va.) 1, 7 (1836: covenant). Accord. O'Brien v. Fowler, 67 Md. 561, 11 Atl. 174 (1887: covenant). Contra.

[59] Statement of facts and part of opinion omitted.

recover of the endorser thereof, and to render the endorser liable thereon."

To which instructions the defendant excepted. * * *

As to the demand necessary to be proved in this case, we think a sufficient one has been proved. At the day the note fell due, the Notary went to the place, where the note was payable, to wit, at the place previously occupied by the Agency of the Southern Life Insurance and Trust Company. Robbins, the late Agent or Cashier, testifies, that the agency had been removed from Apalachicola, some weeks previous to the day of the alleged presentment of the note. The removal of the Agency rendered the demand, therefore, impossible at the Agency. Proper diligence seemed to have been used, and we are satisfied that when demand was made at the place of payment of the note, and it was found that the agency had been removed, a sufficient demand had been made. Of course, if the agency had simply been removed to another house in Apalachicola, a presentment there would have been necessary; but the testimony was, that it had been removed altogether. It is like a case where a note is payable at a particular place, and a demand being made at the place appointed, it is found shut up or deserted. In such an event, it would amount to a refusal to pay, for the demand would be useless and inaudible. 3 Kent, 96. 16 East. 122. If the agency had been continued at Apalachicola there can be little doubt but that a demand should have been made, within the usual hours of business, of the agency, as the parties are supposed to have contracted with a view to the custom of the bank; but there certainly can be extant no rules or customs of the agency, when the agency itself has no existence.

If Robbins, the former agent, had remained at the place of the agency, with power from the bank to do business, that fact may have altered the case; but Robbins testifies, that he did not consider the room formerly occupied as the agency, as an office; that he was agent up to the time of the removal of the agency, when he ceased also to be agent. The fact of Robbins' being at the place, would have no greater effect than any other person's being there.

If the note had been made payable generally, and not at a particular place, and the maker had removed, in such case it would have been the duty of the holder to have made due and diligent search for him, and made presentment, if within the State; but the case at bar is different. If the note is payable at a particular place, the demand must be made there, because the place is made part and parcel of the contract; and, if, as before stated, the place is found shut up and deserted, it amounts to a refusal to pay. Dickinson v. Bon, 16 East, 110, 8 Bingham, 214; Bayley on Bills, 197–241; Story on Prom. Notes, §§ 205–227; Chitty on Bills, 399, 397, 172, 173, 174.

A question may now arise, whether the allegation contained in the declaration, as to presentment of the note, is sustained by the evidence—but it may be laid down as a general principle, that where facts

or circumstances exist, which amount to an excuse, or do away with the necessity of a demand, the declaration may be in the usual form, and proof of the facts which dispense with a formal demand, will in law, be deemed proof of demand. As in the case at bar, no demand in compliance with the terms of the note could have been made on account of the removal of the agency, and this fact being in evidence, it is a sufficient excuse for the non-presentment, and the allegation of the declaration is sustained.

The American cases go to the extent that the averments of demand and notice, in the declaration on a bill or note, were sufficiently supported by evidence of any thing which renders demand and notice unnecessary. Stewart v. Eden, 2 Caines (N. Y.) 121, 2 Am. Dec. 222; Norton v. Lewis, 2 Conn. 478. Hosmer, J., said: "that this mode of declaring, relying on proof of an excuse for the omission to make demand or give notice, had too frequently been sustained to remain questionable."

So, when no demand has been made of the maker, on account of his absence in a foreign country, it was held by Van Ness, that an averment of presentment in the common form was sufficient. Cummings v. Fisher, Anthon, N. P. 2. See, also, City Bank v. Cutter, 3 Pick. (Mass.) 414; 4 Campbell, 52; Hodge v. Fillis, 3 Camp. 463; Ex parte Wallis, 7 Cow. (N. Y.) 523.

So also the fact, that the maker had absconded and could not be found, may be given in evidence, under the allegation that the note was presented and payment refused. Stewart v. Eden, 2 Caines (N. Y.) 121, 2 Am. Dec. 222; Williams v. Matthews, 3 Cow. (N. Y.) 252; Taunton Bank v. Richardson, 5 Pick. (Mass.) 436.

So a promise to pay after notice will be received as evidence of notice. Martin v. Winslow, 2 Mason, 241, Fed. Cas. No. 9,172; Thornton v. Wynn, 12 Wheat. 183, 6 L. Ed. 595; Shirley v. Fellows, 9 Port. Ala. 302. * * *

The judgment of the court below is affirmed with costs.[60]

[60] Lundie v. Robertson, 7 East, 231 (1806); Greenway v. Hindley, 4 Camp. 52 (1814); Kennon v. McRae, 7 Port. (Ala.) 175, 185 (1838); Camp v. Bates, 11 Conn. 487, 493 (1836); Tobey v. Berly, 26 Ill. 426 (1861); Taunton Bank v. Richardson, 5 Pick. (Mass.) 436, 444 (1827); Goodloe v. Godley, 13 Smedes & M. (Miss.) 233, 239, 51 Am. Dec. 150 (1849); Tebbetts v. Dowd, 23 Wend. (N. Y.) 379, 384 (1840); Gibbs v. Cannon, 9 Serg. & R. (Pa.) 198, 203, 11 Am. Dec. 699 (1822); Farmers' Bank v. Day, 13 Vt. 36 (1841); McVeigh v. Bank, 67 Va. 785, 797 (1875). Accord. Burgh v. Legg, 5 M. & W. 418 (1839). Contra.

Aside from the above class of cases excuse for nonperformance of a condition cannot be proven under an allegation of performance. Higgins v. Lee, 16 Ill. 495, 501 (1855); Thompson v. Hoppert, 120 Ill. App. 588, 592 (1905); Smith v. Brown, 3 Blackf. (Ind.) 22 (1832); Duckham v. Smith, 5 T. B. Mon. (Ky.) 372 (1827); Colt v. Miller, 10 Cush. (Mass.) 49 (1852); Shinn v. Haines, 21 N. J. Law, 340 (1848: debt). Accord. Evans v. Howell, 211 Ill. 85, 93, 71 N. E. 854 (1904). Contra.

But there is a tendency to apply the bills and notes rule to insurance cases. German Ins. Co. v. Grunert, 112 Ill. 68, 1 N. E. 113 (1884); West Ins. Co. v

STEWART MFG. CO. v. IRON CLAD MFG. CO.

(Court of Errors and Appeals of New Jersey, 1902. 67 N. J. Law, 577, 52 Atl. 391.)

Appeal from circuit court, Essex county.

GARRISON, J.[61] This is a suit by the Stewart Manufacturing Company upon a contract by which the Iron Clad Manufacturing Company agreed to sell, during two years, 900 heaters under the plaintiff's letters patent, and to pay to the plaintiff license fees therefor, according to a schedule contained in the contract. Breaches of this contract by the defendant might be either (1) its refusal to account for the license fees for the sales of heaters made under the letters patent, or (2) its failure to sell the minimum number of heaters within the prescribed time. In the former case the measure of damage would depend upon the size and pattern of each heater sold as per the schedule of royalties; in the latter case it would be the minimum rate of royalty upon the number of heaters agreed to be sold.

The plaintiff declared specially upon the former of these breaches, alleging the manufacture and sale by the defendant of 900 heaters under the letters patent and the failure to pay over the royalties due thereon. The contract and the common counts were included in the declaration. At the trial the plaintiff proved that during the two years covered by its suit the defendant had sold 386 heaters, upon which, if manufactured under the plaintiff's patent, the sum of $293.70 in license fees would be due according to the table of royalties. The plaintiff was, however, unable to prove that the heaters so sold were made under the plaintiff's patent. A citation from the charge of the learned judge before whom the cause was tried correctly states the proof upon this point. "As a matter of fact," he says, "they (the defendants) have sold three hundred and eighty-six heaters. There is no proof in the case that the heaters which they sold were heaters under the Stewart patent—no absolute proof—but, [and in what follows the learned judge fell into error of law, as I conceive it] inasmuch as they were bound to sell and pay for more heaters under the Stewart patent than they actually sold, I think we have the right to assume that the heaters which they sold were made in pursuance and in fulfillment of their contract, and that they are, therefore, in the absence of other proof, fairly to be taken as made under the Stewart patent." The judge then proceeded to add, to the 386 heaters charged for at royalty rates, enough heaters to make up the 900 which the contract called for, to wit, 514 heaters, upon which, inasmuch as they had not been manufactured at all, the lowest royalty was charged, to wit, 25 cents, making $128.50, which two sums, together

Sheets, 67 Va. 854, 874 (1875); Levy v. Insurance Co., 10 W. Va. 560, 27 Am. Rep. 598 (1877). Accord.

[61] Part of the opinion omitted.

with interest, made the amount for which a verdict was directed for the plaintiff.

The error of law into which I conceive that the trial court fell was that of confusing the two breaches of the contract, which, as has been shown, differed not only in their essential nature and in the proof necessary to sustain them, but also in their measure of damage and in the pleading applicable to each. To charge the defendant with having sold 900 heaters under its contract, on each of which a specific royalty was due, did not in the least degree tend to charge it with having failed to sell 900 heaters as required by the contract. Similarly, to prove that the defendant had failed to sell 900 heaters (if that proof could have been made under the pleadings) did not in any wise tend to prove that the heaters which it had sold had been manufactured under the plaintiff's letters patent. Nor is the matter helped by the presence of the common counts, each of which charges a general right based upon something that has been done, and none of which charges either a general right of recovery because of what has not been done, or a particular failure of the defendant to do some specified thing, except it be his mere failure to pay money.

The direction under review gave to the plaintiff a verdict to which each of these breaches contributed, made up, as it was, in part of royalties upon sales that had been pleaded but not proved,[62] and in part of damages for a breach that had been proved but not pleaded.[63] If error entered into either of these judicial rulings (and apparently it entered into both), the judgment below, which is an entirety, cannot stand. In any event, therefore, there must be a reversal of the judgment brought up by the writ of error. * * *

The result is that the judgment is reversed upon the defendant's writ of error, with costs, and that the plaintiff's writ of error is dismissed, with costs to the defendant.[64]

[62] Kidder v. Flagg, 28 Me. 477 (1848); Penn. Nav. Co. v. Dandridge, 8 Gill & J. (Md.) 248, 313, 29 Am. Dec. 543 (1836: probably applying the principle too strongly). Accord.

[63] A breach must be alleged. Blakey v. Dixon, 2 B. & P. 321 (1800); Canfield v. Merrick, 11 Conn. 425 (1836); Black v. Woodrow, 39 Md. 194, 217 (1874) semble; Williams v. Staton, 5 Smedes & M. (Miss.) 347, 353 (1845); Atlantic Co. v. Young, 38 N. H. 451, 75 Am. Dec. 200 (1859); Myers v. Davis, Fed. Cas. No. 9,986 (1868); Carroll County v. Collier, 63 Va. 302, 307 (1872) semble. Accord.

The breach alleged must be a breach of the promise alleged. Anonymous, Hardres, 320 (1662); Withers v. Knox, 4 Ala. 138 (1842); Atlantic Co. v. Young, 38 N. H. 451, 75 Am. Dec. 200 (1859).

[64] The facts constituting the breach must be alleged. Knight v. Keech, Skinner, 344 (1694) semble; Weigley v. Weir, 7 Serg. & R. (Pa.) 309 (1821) semble; Smith v. Walker, 1 Va. 135 (1792: probably too strict). But this rule does not apply where the acts violating the contract are very numerous. Smith v. Railroad, 36 N. H. 458, 485 (1858). Or consist in a failure to use care. Gliddon v. McKinstry, 25 Ala. 246 (1854). Or are the failure to pay money. Butterworth v. Le Despencer, 3 M. & S. 150 (1814).

"When there is a special count, on a promise to pay money, and general

II. General Assumpsit

COUNTS IN GENERAL ASSUMPSIT FOR MONEY LENT AND FOR GOODS SOLD AND DELIVERED.

(2 Chitty, Pleading [13th Am. Ed.] pp. *17, *37, *55, *87, *90.)

In the Common Pleas.

——— next after ——— in Michaelmas Term, 1 Will. 4.

Middlesex, (to wit) C. D. was attached to answer A. B. of a plea of trespass on the case upon promises; and thereupon the said A. B., by E. F., his attorney, complains. For that whereas the said defendant heretofore, to wit, on the ——— day of ——— in the year of our Lord ——— at ——— in the county of ——— was indebted to the said plaintiff in the sum of £——— for so much money by the said plaintiff before that time lent and advanced to the said defendant, at his special instance and request, and being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid at ——— aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said last-mentioned sum of money, when he, the said defendant, should be thereunto afterwards requested.

And whereas also the said defendant afterwards, to wit, on the day and year last aforesaid, at ——— aforesaid, in consideration that the said plaintiff, at the like special instance and request of the said defendant, had before that time, sold and delivered divers goods, wares, merchandize, and chattels to the said defendant, he, the said defendant, undertook, and then and there faithfully promised the plaintiff to pay him so much money as the last-mentioned goods, wares, merchandize and chattels, at the time of the sale and delivery thereof, were reasonably worth, when he, the said defendant, should be thereunto afterwards requested. And the said plaintiff avers, that the said last-mentioned goods, wares, merchandize and chattels, at the time of the said sale and delivery thereof, were reasonably worth the further sum of £——— of like lawful money, to wit, at ——— aforesaid, whereof the said defendant, afterwards, to wit, on the day and year aforesaid, there had notice.

Nevertheless, the said defendant, not regarding his said several promises and undertakings, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiff in this be-

counts, a general breach is sufficient, but where the special count is on a promise to do or perform any other act, such count ought to allege a breach of the contract." From Farnsworth v. Nason, Brayton (Vt.) 192 (1819). Butterworth v. Le Despencer, 3 M. & S. 150 (1814); Beardsley v. Southmayd, 14 N. J. Law, 534, 543 (1835) semble. Accord. Ellis v. Turner, 19 Va. 196 (1816: breach at end of common counts will not suffice for special count though for money). Contra.

half, hath not as yet paid the said several sums of money, or any or either of them, or any part thereof, to the said plaintiff, although often requested so to do; but the said defendant to pay him the same hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said plaintiff of £——— and therefore he brings his suit, etc.

HIBBERT v. COURTHOPE.

(Court of King's Bench, 1694. Carthew, 276.)

Assumpsit, &c. and judgment against the defendant by default, and now upon a writ of error brought, the error insisted on was, that the declaration was general, (viz.) that the defendant was indebted to the plaintiff in so much money pro opere & labore ipsius (the plaintiff) pro praedicto (the defendant) ad special instantiam & requisitionem praedict' (the defendant) ante tempus illud fact' & performat,' without setting forth what sort or manner of work or labour it was, so that it might appear to the Court to be lawful; for it might be about some unlawful matter, for which the law will not imply any promise, &c.

Sed non allocatur, for PER CURIAM, the only reason why the plaintiff is bound to shew wherein the defendant is indebted, is, that it may appear to the Court that 'tis not a debt on record or specialty, but only upon simple contract; and any general words, by which that may be made to appear, are sufficient.

The judgment was affirmed.[65]

ALDINE MFG. CO. v. BARNARD.

(Supreme Court of Michigan, 1891. 84 Mich. 632, 48 N. W. 280.)

Appeal from circuit court, Kent county;

LONG, J.[66] * * * It is also contended that the plaintiff had no right to waive the tort and sue in assumpsit. There is nothing in this point. It was personal property in the hands of the defendant, to which the plaintiff was lawfully entitled. He demanded it, and defendant refused to surrender the possession. The action was com-

[65] Tate v. Lewen, 2 Saund. 372a (1671); Crawford v. Whittal, 1 Doug. 4 note (1773); Crane v. Grassman, 27 Mich. 443 (1873). Accord. So of a common count in debt. Walker v. Witter, 1 Doug. 1 (1778); Emery v. Fell, 2 T. R. 28 (1787); Wilkins v. Wingate, 6 T. R. 62 (1794); Gray v. Johnson, 14 N. H. 414, 419 (1843).

But the usual general allegation of the nature of the debt is necessary. Tyrwhite v. Kynastan, Noy, 146 (1608); Maury v. Olive, 2 Stew. (Ala.) 472 (1830); Brown v. Webber, 6 Cush. (Mass.) 560, 570 (1850); Turner v. Jenkins, 1 Har. & G. (Md.) 161 (1827).

A count on an account stated need not state the nature of the claims accounted on. Brinsley v. Partridge, Hobart, 88 (1612).

[66] Part of the opinion omitted.

menced in trover, and by stipulation of the parties the form of the action was changed to assumpsit. The possession of the property was obtained under contract between the parties, and the refusal to surrender upon demand amounted to a conversion for which the tort could be waived and assumpsit brought. Tuttle v. Campbell, 74 Mich. 652, 42 N. W. 384, 16 Am. St. Rep. 652. The action could be maintained on the common counts (McLaughlin v. Salley, 46 Mich. 219, 9 N. W. 256,) even though the declaration does not set forth the waiver of the tort (McDonald v. McDonald, 67 Mich. 122, 34 N. W. 276.) We find no error in the record.

The judgment must be affirmed, with costs. The other justices concurred.[67]

ATWOOD v. LUCAS.

(Supreme Judicial Court of Maine, 1866. 53 Me. 508, 89 Am. Dec. 713.)

WALTON, J.[68] The plaintiff says that he was the owner of twenty-three lambs; that he offered to sell them to the defendant for $3.75 per head; that the defendant agreed to buy them at that price, and afterwards paid him fifty dollars and took away four of the lambs, but subsequently refused to take the other nineteen, and threatened to bring a suit to recover back the money he had paid; and the question is whether these facts will support a general indebitatus assumpsit count for goods sold and delivered. Clearly not. To maintain such a count proof of an actual delivery to and acceptance by the purchaser of the goods sued for is essential. If none or part only of the goods have been accepted by the purchaser, the seller's remedy is an action of special assumpsit for goods bargained and sold, not goods sold and delivered. "In these cases," says Mr. Chitty, "the declaration should be framed specially on the contract for not accepting the goods, or for refusing to complete the bargain." 1 Chit. Pl. 345–347; Hart v. Tyler, 15 Pick. (Mass.) 171; Stearns v. Washburn, 7 Gray (Mass.) 187; Messer v. Woodman, 2 Fost. (N. H.) 172, 53 Am. Dec. 241.

It is laid down by Mr. Saunders, that to support an action for goods sold and delivered, the plaintiff must prove, not only such a delivery as will vest the property in the goods in the defendant, but such a delivery as will divest himself of all lien upon the goods, and enable the defendant to maintain trover for them without paying or offering to pay for them. Saund. on Pl. & Ev. 536.

There may be such a delivery as will satisfy the statute of frauds, and yet not such a delivery as will authorize the maintenance of a suit for goods sold and delivered. Delivery to and acceptance by the purchaser of any portion of the goods bargained for will satisfy the

[67] McIntyre v. Thompson, 14 Ill. App. 554 (1884); Nelson v. Kilbride, 113 Mich. 637, 71 N. W. 1089 (1897). Accord.

[68] Part of the opinion omitted.

statute of frauds, but to authorize the maintenance of a suit for goods sold and delivered there must be a delivery and acceptance of all the goods sued for.

The difficulty in the way of maintaining this suit does not arise out of the statute of frauds, for the defendant actually took and carried away four of the twenty-three lambs bargained for, and so far as the statute of frauds is concerned this was as good a delivery as if he had taken the whole. The difficulty is that he has not adopted a form of action suited to his case. Nineteen of the lambs sued for were never taken by the defendant. They remained upon the premises of the plaintiff and under his care, and were sheared by him the following season, and for aught that appears are still in his possession; and the law is well settled that if any portion of the goods sued for remain undelivered by the seller, or unaccepted by the purchaser, or subject to a lien for the purchase money, the seller must declare specially, and not generally as for goods sold and delivered.

The principal reason for requiring the plaintiff to declare specially is to enable the Court properly to adjust the damages. In an action for goods sold and delivered the measure of damages is the contract price or full value of the goods sued for, which is unjust if the whole or any portion of the goods still remain the property of the plaintiff and under his control. But if the plaintiff declares specially, setting out first the contract, and then the breaches of it on the part of the defendant, the Court is enabled to adopt such a measure of damages as will do exact justice between the parties. * * *

Plaintiff nonsuit.[69]

APPLETON, C. J., and KENT, DICKERSON, BARROWS and DANFORTH, JJ., concurred.

[69] Simmons v. Swift, 5 B. & C. 857 (1826); Boulter v. Arnott, 1 C. & M. 333 (1833); Arons v. Cummings, 107 Me. 19, 78 Atl. 98, 31 L. R. A. (N. S.) 942 (1910). Accord.

Such a count will not lie where the delivery is to a third person. Boston Co. v. Dewey, 6 Gray (Mass.) 446 (1856).

Generally the plaintiff must allege the nature of the debt truly. Power v. Butcher, 10 B. & C. 329 (1829) semble; Moore v. Ross, 7 N. H. 528 (1835); North Co. v. Church, 22 N. J. Law 424, 429, 53 Am. Rep. 258 (1850); Hemenway v. Smith, 28 Vt. 701 (1856). Accord. Dauchy v. Gunder, 150 Ill. App. 604, 609 (1909: rent may be recovered without count for use and occupation). Contra.

A count for goods bargained and sold will lie where there has not been delivery. Rohde v. Thwaites, 6 B. & C. 388 (1827); Acme Co. v. Older, 64 W. Va. 255, 61 S. E. 235, 17 L. R. A. (N. S.) 807 (1908). See, also, 1 Chitty (13th Am. Ed.) pp. *345, *347.

PARKER v. MACOMBER.

(Supreme Court of Rhode Island, 1892. 17 R. I. 674, 24 Atl. 464, 16 L. R. A. 858.)

Assumpsit by Arthur T. Parker against Lydia A. Macomber. There was judgment for plaintiff, and defendant petitions for a new trial. Denied.

DOUGLAS, J.[70] This is an action of assumpsit, brought to recover compensation for board, maintenance, care, and nursing for 390 weeks from April 1, 1881, to October 1, 1888, at $5 per week—$1,950. The declaration contains the common counts in indebitatus assumpsit for goods sold and delivered, work and labor, money had and received, and for interest. The jury returned a verdict for the plaintiff, and assessed his damages at $1,072.50, being at the rate of $2.75 per week for 390 weeks. It appeared that the services rendered were induced by a parol agreement between the parties by which the plaintiff agreed that he and his wife should live in the house of the defendant and care for and maintain her during her natural life, and the defendant agreed, in consideration of these services, that she would charge no rent for the house, would pay eight dollars per month board, and would give the house and leasehold interest in the lot to the plaintiff at defendant's death. She did not pay the board as agreed, but did pay some milk bills for the plaintiff on account. Plaintiff's wife died February 13, 1888, and from that time he furnished housekeepers. In August, 1888, defendant notified plaintiff to leave the house, and he removed October 1. Evidence was introduced against the objection of defendant of the value of the services rendered. The defendant now prays for a new trial, on the ground that the services were performed under an entire contract, which was not completed by the plaintiff because of the death of his wife, whose personal attendance formed an essential part of the consideration of it, and because the evidence objected to was inadmissible under the declaration. The plaintiff contends that after the death of his wife the same services were rendered by the housekeepers whom he engaged, and that he was prevented from completing the contract by the defendant, who ejected him from the house, and not by his wife's death.

The questions which are raised by the petition are whether the plaintiff can recover what his services are reasonably worth notwithstanding the making of the contract, and, if so, whether this declaration is sufficient without a count in quantum meruit to admit evidence of the value of the services and to sustain judgment therefor. * * *

If the plaintiff was prevented from continuing his contract by the arbitrary act of the defendant, he may disregard it, and recover the value of the services he has rendered in partial performance of it.

[70] Part of the opinion omitted.

Greene v. Haley, 5 R. I. 260. If the death of the plaintiff's wife was a substantial failure of the consideration, then the defendant was justified in rescinding the contract, as the full performance of it on the part of the plaintiff had become impossible. We think such was the case. The personal services and attentions of the wife to the defendant, who was the plaintiff's aunt, were undoubtedly contemplated by the parties as more agreeable and efficient than the services of strangers could be, and may well be considered an essential part of the benefits which the defendant was to receive. Yerrington v. Greene, 7 R. I. 589, 84 Am. Dec. 578; Knight v. Bean, 22 Me. 531; Spalding v. Rosa, 71 N. Y. 40, 27 Am. Rep. 7; Stewart v. Loring, 5 Allen (Mass.) 306, 81 Am. Dec. 747.

The question is then presented whether a person who has rendered personal services under an entire contract which the act of God has prevented him from fully performing can recover upon an implied assumpsit what those services are reasonably worth. * * *[71]

The question remains whether the plaintiff's declaration is sufficient without the count in quantum meruit. We think it is sufficient. A count in quantum meruit, as well as one in indebitatus assumpsit for work, labor, skill, care, and diligence, etc., claims a certain sum as due. In either case the plaintiff may recover less, and the judgment is for so much of his stated claim as is found to be justly merited. The counts in quantum meruit and quantum valebat are therefore unnecessary in any case. 1 Chit. Pl. *352, *353. The petition for a new trial must be denied and dismissed.[72]

BONNEY v. SEELY.

(Supreme Court of New York, 1829. 2 Wend. 481.)

This was an action of assumpsit, tried at the Tompkins circuit, in June, 1828, before the Hon. Samuel Nelson, one of the circuit judges.

The declaration contained the common money counts. The plaintiff had given a bill of particulars, in which he claimed to recover for money paid by him for the defendants, in consequence of having joined with them in making a note for $300 for their accommodation, and which he had been compelled to pay. The note, and an agreement by the defendants to save the plaintiff harmless from the

[71] The court concluded that on the present facts the plaintiff had a right to recover.

[72] Burke v. Claughton, 12 App. Cas. (D. C.) 182, 187 (1898) semble; Andre v. Hardin, 32 Mich. 324 (1875); Viles v. Power Co., 79 Vt. 311, 320, 65 Atl. 104 (1903). Accord. See, also, 2 Saund. 122, note 2.

But a definite sum due by contract cannot be recovered under a quantum meruit or quantum valebant count. Carson v. Allen, 6 Dana (Ky.) 395 (1838); Willis v. Melville, 19 La. Ann. 13 (1867); Weart v. Hoagland, 22 N. J. Law, 517 (1850).

payment thereof, were produced. A judgment was obtained by the holders of the note against the plaintiff in this suit for $401.61, which was satisfied by the plaintiff by the conveyance of a lot of land, the consideration expressed in which was $548.31. This evidence of payment in land instead of money was objected to as variant from the bill of particulars, but was received by the judge. * * * The jury found accordingly.

SAVAGE, C. J.[73] It was decided in Ainslee v. Wilson, 7 Cow. 668, 17 Am. Dec. 532, that the conveyance of land received in discharge of a money debt due from the plaintiff is, in judgment of law, to be considered the same thing as if the plaintiff had actually paid money. So in Randall v. Rich, 11 Mass. 498, Parker, C. J., says, in a similar case, as to this point, "the satisfaction of the execution ought to be considered as a payment of the debt in money; and although land is taken, it is taken at money's worth; and the debt which might have been exacted in money, at all events has been discharged." Those cases settle the question that the payment of the debt of the defendants in land is sufficient to sustain the action for money paid. * * *

A new trial is granted; costs to abide the event.[74]

PENOBSCOT R. CO. v. MAYO.

(Supreme Judicial Court of Maine, 1878. 67 Me. 470, 24 Am. Rep. 45.)

LIBBEY, J.[75] This action[76] is brought by N. Wilson, in the name of the plaintiff, as assignee or pledgee of the claim in suit. * * *

The writ contains three counts. 1. On an account annexed. 2. Money had and received. 3. On a promissory note for $4,000 given by defendant to plaintiff dated May 28, 1862, payable in one year with interest. The action was commenced January 3, 1870. Defendant pleaded and relies upon the statute of limitations. The case

[73] Statement of fact abridged, and part of the opinion omitted.

[74] Miller v. Miller, 7 Pick. (Mass.) 133, 19 Am. Dec. 264 (1828); Lord v. Staples, 23 N. H. 448, 456 (1851); Ainslie v. Wilson, 7 Cow. (N. Y.) 662, 668, 17 Am. Dec. 532 (1827). Accord. Moore v. Pyrke, 11 East, 52 (1809: chattels; doubted in Rodgers v. Maw, 15 M. & W. 444 [1846]); Carlisle v. Dunn, 5 Blackf. (Ind.) 605 (1841) semble. Contra.

The giving of a negotiable note will sustain the count for money paid. Barclay v. Gorch, 2 Esp. 571 (1797); Cornwall v. Gould, 4 Pick. (Mass.) 444 (1827); Pearson v. Parker, 3 N. H. 366 (1826); Witherby v. Mann, 11 Johns. (N. Y.) 518 (1814); Craig v. Craig, 5 Rawle (Pa.) 91 (1835). But giving a nonnegotiable bond will not. Taylor v. Higgins, 3 East, 169 (1802); Cumming v. Hackley, 8 Johns. (N. Y.) 202 (1811); Morrison v. Berkey, 7 Serg. & R. (Pa.) 238 (1821). Nor will the giving of a mortgage. Kearney v. Tanner, 17 Serg. & R. (Pa.) 94, 17 Am. Dec. 648 (1827).

[75] Statement of facts and part of opinion omitted.

[76] Of assumpsit.

was referred under a rule of court on legal principles, the referee to report any facts and questions of law that either party might desire with right of exceptions. So far as is material for the consideration of the questions involved, the following facts appear from the reports of the referee: On the 28th of May, 1862, the plaintiff sold to the defendant $68,700 of its bonds for $4,000, the defendant giving his note therefor, payable in one year with interest. The plaintiff corporation by vote of the same date, pledged the note to the directors as security for the several amounts by them advanced to the company and then due them, and when collected to be divided among them in proportion to the sum actually due to each. When the defendant gave the note it was verbally agreed between the parties that if he did not sell the bonds or receive any compensation for them, his note should be canceled and given up to him without pay. On the 13th of July, 1864, the defendant falsely and fraudulently represented to the directors of the plaintiff corporation that he had turned over the bonds to the European and North American Railway Co., which had become the purchaser of all the property of the plaintiff, without pay or compensation therefor, suppressing the fact that he had previously sold the bonds and received therefor $22,000 in the bonds of the European and North American Railway Co., and thereby procured the surrender of his note without payment. The fraud was concealed by the defendant and did not come to the knowledge of the plaintiff till January 7, 1868. The account annexed to the writ contains the following item: "1864, July 13. To your note of $4,000, on interest from May 28, 1862, given up by reason of your false representation that you had surrendered the bonds for which it was given without consideration or payment, and it was therefore to be given up and canceled, whereas you had sold and received pay for said bonds in October, 1863, long prior to giving it up, $6,400." In the writ the plaintiff specified that, under the second count, it will prove "the account annexed and that the money was received by the defendant to the use of the plaintiff." Upon these facts the referee finds, as matter of law, that the action can only be maintained on the note declared on in the third count, and that the action is barred by the statute of limitations. If the first finding is correct, it follows that the action is barred. This court so held in 65 Maine, 566, supra. That decision is invoked by the counsel for the defendant as decisive of the case as now presented. We think it is not.

Undoubtedly the plaintiff can maintain an action for the fraud of the defendant in procuring the surrender of the note without payment. It might maintain an action of case for the fraud, or of trover for the note. In either case the statute of limitations would commence to run from the time the fraud was discovered, or might have been discovered in the use of due diligence by the plaintiff. And if by the fraud the defendant procured money, or its equivalent, the

tort may be waived by the plaintiff, and assumpsit for money had and received maintained.

Did the defendant by procuring the surrender of his own note then overdue without payment receive the equivalent of money?

It has been repeatedly held that where a debtor procures a discharge of his debt by payment, in whole or in part, in counterfeit money, an action for money had and received may be maintained for the amount of the payment thus made, the plaintiff first tendering back the counterfeit money received. So an agent who discharges a debt due to his principle by taking a note payable to himself, may be held for money had and received, though the note is unpaid. Floyd v. Day, 3 Mass. 403, 3 Am. Dec. 171; Hemmenway v. Bradford, 14 Mass. 121; Hemenway v. Hemenway, 5 Pick. (Mass.) 389; Fairbanks v. Blackington, 9 Pick. (Mass.) 93.

There is stronger reason for holding one who has procured the surrender of his own note, for money had and received, than where he has received the note of another. So where the defendants procured the plaintiffs, who were agents of the defendants' creditors, to procure the discharge of their debt, and the plaintiffs did so by giving their principals credit therefor, and charged the amount to the defendants, it was held equivalent to the payment of money by the plaintiffs, and the receipt of money by the defendants, and an action for money paid or money had and received might be maintained. Emerson v. Baylies, 19 Pick. (Mass.) 55.

In Perry v. Swasey, 12 Cush. (Mass.) 36, the maker of a note released to a third person a claim against him to an amount equal to the note, upon the promise of such third person to pay and take up the note. In discussing the question whether the holder of the note could maintain an action for money had and received against such third person, Shaw, C. J., in delivering the opinion of the court says: "We are strongly inclined to the opinion that the plaintiff is entitled to recover on the money counts, as for money had and received. Hall v. Marston, 17 Mass. 575. Mrs. Harvey placed money in the hands of the defendant for the use of the plaintiff. * * * The discharge of a debt due in money is, for many purposes, equivalent to a payment in cash. One who has collected the debt of another, by taking a note in his own name, is liable as for money had and received."

In Stuart v. Sears, 119 Mass. 143, the plaintiff was induced to allow the defendant in part payment of the sum due from him, a credit of $1,000 in the settlement of their accounts, by the presentation by the defendant of a false voucher therefor. It was held that the plaintiff might recover the $1,000 under a count for money had and received, the court treating the allowance of the credit by plaintiff as money paid by him and received by the defendant. See Ames v. York National Bank, 103 Mass. 326; Baxter v. Paine, 16 Gray (Mass.) 273.

In Hall v. Huckins, 41 Me. 574, the defendant was indebted to the States of Maine and Massachusetts for the stumpage of certain timber. He claimed that the plaintiffs should pay him the amount, and in a settlement with them charged them the amount claimed, and gave them an agreement to account to and allow them any and all deductions which he might obtain in settlement with those states. He obtained a certain deduction by Massachusetts. In discussing the question whether the plaintiffs could recover under the count for money had and received, Appleton, J., in delivering the opinion of the court, says: "To enable the plaintiff to recover under the money counts, it has not been held necessary in all cases to show that money has actually been received. If anything has been received in lieu of money, it equally entitles the plaintiff to recover," citing several authorities. In applying the rule to the case then under consideration, he says: "Whatever reduction might be obtained would be for the eventual benefit of the plaintiffs. Had the stumpage been paid to the commonwealth of Massachusetts, the reduction would have been by repayment to the defendant of the amount discounted. Whether the reduction were made by passing a specified sum to the credit of the defendant, or whether the stumpage, having been paid, the amount discounted were repaid to the defendant, would make no difference to him nor to the plaintiffs who were to have the benefit of whatever allowance might be made." In this case the defendant had received no money, but the court held that the reduction by Massachusetts from the amount due from him was equivalent to money, and sufficient to maintain the action for money had and received.

After a careful consideration of the question, we feel clear, both on principle and authority, that fraudulently procuring the surrender and cancellation of the note by the defendant, without payment, was equivalent to the receipt by him of the money due upon it. The note was for money. It was overdue. If the defendant had paid it, and then by the same fraud had procured the money to be paid back, there could be no question. But to both parties it would be substantially the same as procuring the note.

The action is maintainable under the count for money had and received for fraudulently obtaining the note without payment, and the same rule of limitation applies that is applicable to an action for the fraud. Upon the report of the referee the plaintiff is entitled to recover the sum of $4,260.50 and interest from August 26, 1873.

Exceptions sustained.

Report recommitted.[77]

APPLETON, C. J., and DICKERSON, DANFORTH and VIRGIN, JJ., concurred. PETERS, J., having been of counsel, did not sit.

[77] Israel v. Douglas, 1 H. Bl. 239 (1789: disapproved in 3 East, 169); Hall v. Huckins, 41 Me. 574 (1856); Emerson v. Baylies, 19 Pick. (Mass.) 55 (1837); Perry v. Swasey, 12 Cush. (Mass.) 36 (1853); Warren v. Batchelder, 16 N. H.

VICTORS v. DAVIES.

(Court of Exchequer, 1844. 12 Mees. & W. 758.)

Assumpsit. The declaration stated, that the defendant, on the 6th of March, 1844, was indebted to the plaintiff in the sum of £10., for money lent by the plaintiff to the defendant.

Special demurrer, assigning the following causes: That it is not alleged in the declaration that the money was lent to the defendant at his request, and that therefore there is no consideration to support the promise; nor does it sufficiently appear that the defendant was indebted to the plaintiff.

Pearson, in support of the demurrer.—The declaration is insufficient for want of the averment that the money was lent to the defendant "at his request." [ALDERSON, B.—How can there be a lender unless there be also a borrower?] A plaintiff is bound to allege a request, wherever the consideration is executed. In the notes to Osborne v. Rogers, 1 Saund. 264, note 1, it is said that "a past consideration is not sufficient to support a subsequent promise, unless there was a request of the party, either express or implied, at the time of performing the consideration." And, in a note by the learned editors of the fifth edition, it is added, "So even an affidavit (to hold to bail) of debt for money lent and for goods sold and delivered, and for work and labour, has been held irregular, because it omitted to state that it was 'at the instance and request of the defendant,' although it stated that it was 'to and for his use and on his account;'" for which they cite Durnford v. Messiter, 5 M. & S. 446. In Chitty on Pleading, vol. I (7th Ed.) p. 353, it is also said, "In each of these counts upon an executed consideration, except that for money had and received, and the account stated, it is necessary to allege that the consideration of the debt was performed at the defendant's request, though such request might, in some cases, be implied in evidence." [PARKE, B.—There is a very learned note of my Brother Manning on this subject,[78] in which he goes into the whole law with

580 (1845); Kent v. Watson, 46 N. H. 148 (1865); Linn v. Cook, 19 N. J. Law, 11 (1842). Accord.

So a count for money had and received will lie, where defendant received a negotiable note as money. Wilkinson v. Clay, 6 Taunt. 110 (1815); Hemmenway v. Bradford, 14 Mass. 121 (1817); Willie v. Green, 2 N. H. 333 (1821); Seavey v. Dana, 61 N. H. 339 (1881) semble.

The same is true where defendant has received other valuable property as money. Pickard v. Bankes, 13 East, 20 (1810: country bank notes); Spratt v. Hobhouse, 4 Bing. 178 (1827: nonnegotiable claim against third party); Miller v. Miller, 7 Pick. (Mass.) 133, 19 Am. Dec. 264 (1828: real estate, coal, part money); Earle v. Whiting, 196 Mass. 371, 82 N. E. 32 (1907: claim of depositor against bank); Woodbury v. Woodbury, 47 N. H. 11, 18, 90 Am. Dec. 555 (1866: land); Clark v. Pinney, 6 Cow. (N. Y.) 297 (1826: nonnegotiable note of third party).

But the receipt of property, not as the equivalent of money, will not suffice. Nightingal v. Devisme, 5 Burr. 2589 (1770); Leery v. Goodson, 4 D. & E. 687 (1792). Accord. Longchamp v. Kenny, 1 Doug. 137 (1779). Contra.

[78] 1 M. & G. 265.

respect to alleging a request, and points out the error into which Mr. Serjeant Williams appears to have fallen in his comment upon Osborne v. Rogers. The note is thus: "The consideration being executory, the statement of the request in the declaration, though mentioned in the undertaking, appears to have been unnecessary. In Osborne v. Rogers, the consideration of a promise is laid to be, that the said Robert, at the special instance and request of the said William, would serve the said William, and bestow his care and labour in and about the business of the said William; and the declaration alleges, that Robert, confiding in the said promise of William, afterwards went into the service of William, and bestowed his care and labour in and about &c. Here the consideration is clearly executory, yet Mr. Serjeant Williams, in a note to the words 'at the special instance and request' says, 'these words are necessary to be laid in the declaration, in order to support the action. It is held, that a consideration executed and past,—as, in the present case, the service performed by the plaintiff for the testator in his lifetime, for several years then past,—is not sufficient to maintain an assumpsit, unless it was moved by a precedent request, and so laid.' The statement, according to modern practice, of the accrual of a debt for, or the making of a promise for the payment of, the price of goods sold and delivered, or for the repayment of money lent, as being in consideration of goods sold and delivered, or money lent to the defendant, at his request, is conceived to be an inartificial mode of declaring. Even where the consideration is entirely past, it appears to be unnecessary to allege a request, if the act stated as the consideration cannot, from its nature, have been a gratuitous kindness, but imports a consideration per se. It being immaterial to the right of action whether the bargain, if actually concluded and executed, or the loan, if made, and the monies actually advanced, was proposed and urged by the buyer or by the seller, by the borrower or by the lender. Vide Rastall's Entries, tit. 'Dette;' and Co. Ent. tit. 'Debt.'" There cannot be a claim for money lent unless there be a loan, and a loan imports an obligation to pay. If the money is accepted, it is immaterial whether or not it was asked for. The same doctrine will not apply to money paid; because no man can be debtor for money paid, unless it was paid at his request. What my Brother Manning says, in the note to which I have referred, is perfectly correct.]

POLLOCK, C. B. There cannot be a doubt about this case; the statement that the money was lent implies that it was advanced at the request of the defendant. There must be judgment for the plaintiff.

PARKE, ALDERSON, and ROLFE, BB., concurred.

Judgment for the plaintiff.[79]

[79] Somerville v. Grim, 17 W. Va. 803, 810 (1881: debt). Accord.

So of counts for goods sold or sold and delivered. Canfield v. Merrick, 11 Conn. 425 (1836: goods sold); Durrill v. Lawrence, 10 Vt. 517 (1838: goods

CITY OF NEWPORT NEWS v. POTTER.

(Circuit Court of Appeals, 1903. 122 Fed. 321, 58 C. C. A. 483.)

McDowell, District Judge.[80] This is an action of assumpsit brought in the Circuit Court for the Eastern District of Virginia by Alexander Potter, a citizen of New York, against the city of Newport News. There was a verdict and judgment for $4,000 and costs in favor of the plaintiff below. The case is brought here by the city on writ of error. * * *

On June 27, 1898, a written contract, the terms of which had in the main been previously agreed on, between Potter and the city was executed. By this contract Potter agreed to supervise and superintend the construction of the sewer system, and to provide at his own expense such engineers, inspectors, and other employés as might be necessary to secure compliance by the contractor with the plans and specifications. He was also to give to the work so much of his own time and talents as might be needed to thoroughly protect the interests of the city, and to see that the work of the contractors was done in a complete and satisfactory manner. * * *

The first count of the amended declaration is based on the theory of an express contract right on the part of Potter to have $25 per day for the services of himself and his employés. The second and third counts—there are but three counts—read as follows:

"And for this also, to wit, that the defendant is indebted to plaintiff in the sum of $8,150, with interest thereon from the 16th day of July, 1900, for other money by the said defendant, before that time, had and received to and for the use of said plaintiff, which sum the defendant then and there faithfully promised to pay to plaintiff when it, the defendant, should be thereunto afterwards requested.

"And for this also, to wit, that the defendant is indebted to the plain-

sold and delivered; debt). Accord. McEwen v. Morey, 60 Ill. 32 (1871: goods sold and delivered; bad on special demurrer) semble. Contra. So of a count for money had and received. Somerville v. Grim, 17 W. Va. 803, 810 (1881: debt).

In McCrary v. Brown, 157 Ala. 518, 50 South. 402 (1908), the court said: "The third count of the substituted complaint, which is a common count for work and labor done, fails to aver that the work and labor was done at the request of defendant. This defect was specifically pointed out by the demurrer interposed to the count. The demurrer should have been sustained (Form 10, in Code, p. 944; 2 Ency. Pl. & Pr. 1004), non constat the work and labor was performed gratuitously or the defendant neither accepted nor received the benefit of such labor." Canfield v. Merrick, 11 Conn. 425, 429 (1836) semble. Accord. So of a count for materials furnished. Carman v. Scribner, 3 Houst. (Del.) 554 (1867). And of a count for money paid. Mass. Co. v. Green, 185 Mass. 306, 70 N. E. 202 (1904). Accord. Somerville v. Grim, 17 W. Va. 803, 810 (1881). Contra.

If the count alleges acceptance of the work, an allegation of request is not necessary. La Fayette Ry. v. Tucker, 124 Ala. 514, 27 South. 447 (1899). Accord. Carman v. Scribner, 3 Houst. (Del.) 554 (1867). Contra.

[80] Part of the opinion omitted.

tiff in the sum of $8,150.00, with interest thereon from the 16th day of July, 1900, for services rendered the defendant by the plaintiff at the special instance and request of the defendant."

The city demurred to the amended declaration, and to each count, and filed written grounds of demurrer. The demurrer was overruled. Thereupon the city filed a plea of non assumpsit and several special pleas, on which issue was joined, raising several of the points to be hereinafter considered. The first assignments of error are based on the action of the trial court in overruling the demurrer.

The first ground of demurrer is that the declaration does not in any count allege that the city "had authority to make the contract or incur indebtedness." In 14 Ency. Pl. & Pr. p. 243, it is said: "When a municipal corporation seeks to avoid its contract on the ground of its want of power to contract, and the contract is not upon its face necessarily beyond the scope of its authority, its authority to make such contract will be presumed, and in an action on the contract the defense of ultra vires must be both pleaded and proved." See, also, 5 Ency. Pl. & Pr. pp. 95, 96; 1 Dill. Munic. Corps. (4th Ed.) § 457; 4 Thomp. Corps. § 5644; Green's Brice, Ultra Vires, p. 37. Certainly a contract for supervising the construction of a city sewer is not upon its face necessarily beyond the scope of the city's authority. This ground of demurrer was not well taken.[81]

The second ground of demurrer is that it is not alleged that "the said contract was let and concluded as prescribed by the city charter." Without mentioning other reasons why this ground of demurrer is bad, it is sufficient to say that the authorities above cited fully sustain the action of the trial court in this respect.

The third ground of demurrer is "that the said declaration does not, nor does any count thereof, contain any allegation sufficiently certain that the defendant promised to pay plaintiff the sum declared for in said declaration." In the first and second counts the allegation of the promise to pay is made. This ground therefore relates only to the third count, which is the common count of indebitatus for services rendered, omitting the usual allegation of a promise to pay. Under the strict rule of the common law, this allegation is necessary.[82] 1

[81] No such allegation is necessary in a common count. Folsom v. School Dist., 91 Ill. 402 (1879). The rule is the same concerning a special count. Montague v. School Dist., 34 N. J. Law, 218 (1870: debt); Brown v. Point Pleasant, 36 W. Va. 290, 300, 15 S. E. 209 (1892). Possibly, if the power were one such a corporation presumptively did not have, the rule would be different. Frye v. Bank, 10 Ill. 332 (1848: bill in equity).

So other affirmative defenses need not be overthrown by the declaration. Whitall v. Morse, 5 Serg. & R. (Pa.) 358, 362 (1819: prevention by plaintiff); Ware v. Webb, 32 Me. 41 (1850: statute of limitations); Dean v. Crall, 98 Mich. 591, 57 N. W. 813, 39 Am. St. Rep. 571 (1894: need not allege an estoppel against defendant setting up any given defense).

[82] Bedford v. Ussington, 1 Sid. 306 (1666); Head v. Baldry, 6 A. & E. 459 (1837); Maddox v. Brown, 9 Port. (Ala.) 118 (1839) semble; Turner v. Jenkins, 1 Har. & G. (Md.) 161 (1827); Swem v. Sharretts, 48 Md. 408 (1878;

Chitty, Pl. (16th Am. Ed.) pp. 392, 394; 4 Minor's Insts. (3d Ed.) p. 697; Cooke v. Simms, 6 Va. 39; Winston v. Francisco, 2 Va. 188; Sexton v. Holmes, 17 Va. 566; Wooddy v. Flournoy, 20 Va. 506. But contra, Andrews' Stephens, Pl., note, pp. 110, 111. However, section 3272, Code Va. 1887, reads:

"On a demurrer * * * the court shall not regard any defect or imperfection in the declaration or pleadings, whether it has been heretofore deemed mispleading or insufficient pleading or not, unless there be omitted something so essential to the action or defence, that judgment according to law and the very right of the cause, can not be given. * * *"

This statute, taken from 27 Eliz. c. 5, first appeared in the Code of 1819 (1 Rev. Code 1819, p. 511, c. 128, § 101), subsequent to the institution of the cause of Wooddy v. Flournoy, supra. Our attention has not been called to, nor have we found, any Virginia case decided since this statute was enacted which holds that a promise to pay must be alleged in the common count of indebitatus assumpsit.

When the plaintiff alleges that the defendant is indebted to him for services rendered at the request of the defendant he has said enough to imply a promise by the defendant to pay for the services. The common-law rule requiring that a promise, not expressly made but implied by law, must be averred, is so highly technical that we cannot, having in view the statute above quoted, hold that the trial court committed error in refusing to sustain the demurrer on this ground. * * *

Affirmed.

YONG DEN v. H. R. HITCHCOCK.

(Supreme Court of the Hawaiian Islands, 1898. 11 Hawaii, 270.)

FREAR, J.[83] This is assumpsit for $25. The complaint contains three paragraphs. The first is a count for money had and received, except that the breach is not set forth therein. The second, entitled "Second Count," sets forth more particularly how the money was received, namely, by being taken from the plaintiff's person by a policeman and by him placed in the control of his official superior and Deputy Marshal, the defendant. This paragraph also does not set forth a breach of the promise alleged therein. The third paragraph sets forth that the defendant "not regarding his said several promises and un-

rule changed by statute) semble; Morgantown Bank v. Foster, 35 W. Va. 357, 363, 13 S. E. 996 (1891) semble. Accord. Potomac Laundry v. Miller, 26 App. D. C. 230 (1905: rule of court); Candler v. Rossiter, 10 Wend. (N. Y.) 487 (1833) semble. Contra.

The same is true of a common count on a quasi contract. Wingo v. Brown, 12 Rich. (S. C.) 279 (1859); Robinson v. Welty, 40 W. Va. 385, 392, 22 S. E. 73 (1895). Accord. Wheeler v. Wilson, 57 Vt. 157 (1884). Contra.

[83] Part of the opinion omitted.

dertakings has not paid the said several sums of money, or either of them," etc.

The defendant demurred upon the following grounds:

"1. That complaint does not state a cause of action. * * *"

The District Magistrate sustained the demurrer and the plaintiff appealed to this court.

If either count is good, the demurrer should have been overruled. In our opinion neither count is shown to be bad.

The objection to the first count is that it is incomplete in that it does not show a breach. But a breach is shown, namely, in the third paragraph of the complaint. This is a separate paragraph and was intended to apply to both counts, as is evident from the expressions, "several promises and undertakings," "several sums" and "either of them." * * *

The judgment appealed from is reversed and the case remanded to the District Court for such further proceedings as may be proper.[84]

POWELL v. WILLIAMS.

(Supreme Court of Michigan, 1894. 99 Mich. 30, 57 N. W. 1041.)

Error to circuit court, Wayne County; Cornelius J. Reilly, Judge. Assumpsit by John H. Powell, as assignee of William C. Ross, against Thomas H. B. Williams. From a judgment for plaintiff, defendant appeals. Reversed.

HOOKER, J. The plaintiff brought an action to recover the price of certain lumber sold to the defendant by William Ross, basing his right to recover upon an assignment for the benefit of creditors made by Ross to him. The following is what the record shows about the pleadings: "Declaration: Assumpsit on the common counts, each count stating a cause of action in favor of the plaintiff, 'John H. Powell, assignee,' and against the defendant, the name of William C. Ross being nowhere mentioned in the declaration. Amended Declaration: At a former trial of the case the declaration was twice amended, as appears in the testimony of William C. Ross, infra. For convenience the amendments are here repeated. The first amendment added the words, 'John H. Powell, assignee William C. Ross, who has made an assignment in favor of his creditors, for and in behalf of said creditors, plaintiff herein.' Upon suggestion of the court, the date of the assignment, March 12, 1891, was also added. The third amendment added the

[84] Butterworth v. Le Despencer, 3 M. & S. 150 (1814); Beardsley v. Southmayd, 14 N. J. Law, 534, 543 (1835) semble; Farnsworth v. Nason, Brayton (Vt.) 192 (1819) semble. Accord.

A breach must be alleged. Dalton v. Smith, Smith, 618 (1805) semble; Cobbett v. Cochrane, 8 Bing. 17 (1831) semble; Rider v. Robbins, 13 Mass. 284 (1816) semble; Metcalf v. Robinson, Fed. Cas. No. 9,497 (1841).

In Douglass v. Central Land Co., 12 W. Va. 502, 510 (1878), the court held that it must appear that the debt has not been paid before suit.

words: 'And who is now the owner and possessor of all claims and demands against the defendant herein named.' The foregoing are all the amendments to the declaration, which still remained in the common counts in the name of Powell as plaintiff. Plea, general issue."

The testimony tended to show the sale of lumber by Ross to defendant, and the balance due thereon, and also the assignment for the benefit of creditors from Ross to plaintiff. All testimony was taken under objection and exception, and the court was requested to take the case from the jury on the ground of a variance. This declaration nowhere alleges that Williams, the defendant, was indebted to Ross, or that he was being sued for any such claim. It distinctly states that the goods were sold and delivered by the plaintiff. The amendments do not help it in this particular, for they merely state that plaintiff is the assignee of Ross by assignment dated March 12, 1891, and that he is now the owner and possessor of all claims and demands against the defendant. Had it alleged that the defendant was indebted to Ross for goods sold and delivered by him (Ross) to the defendant, and that the claim of said Ross had been by him assigned to the plaintiff, it would have correctly stated the facts which the plaintiff appears to have been trying to prove. Peirce v. Closterhouse, 96 Mich. 124, 55 N. W. 663, and cases cited. See, also, Barnum v. Stone, 27 Mich. 332.

The judgment must be reversed, and a new trial ordered. The other justices concurred.[85]

McLEOD v. POWE & SMITH.

(Supreme Court of Alabama, 1847. 12 Ala. 9.)

Writ of Error to the Circuit Court of Wilcox.

Assumpsit by McLeod, as executor of R. G. Gordon, against Powe & Smith. The cause of action set forth in the declaration is this:

On the 7th February, 1842, the marshal of the United States for the southern district of Alabama, having an execution in hand issued from the circuit court for that district, in favor of one Clapp for $3,-

[85] If an indebtedness to a third party is alleged, the count must aver transfer to the plaintiff. University v. Baxter, 42 Vt. 99, 103 (1869).

In a special count alleging a contract with a third party a transfer to the plaintiff must appear. Sistermans v. Field, 9 Gray (Mass.) 331 (1857); Rose v. Jackson, 40 Mich. 29, 34 (1879); De Forest v. Frary, 6 Cow. (N. Y.) 151 (1826); McNeil v. Golden Cross, 131 Pa. 339, 18 Atl. 899 (1890); University v. Baxter, 42 Vt. 99 (1869).

So of a common count in debt. Commonwealth v. Leonard, 10 Wkly. Notes Cas. (Pa.) 537 (1881). Of a special count in debt on a note. Hamilton v. Ewing, 6 Blackf. (Ind.) 88 (1841); Camp v. Bank, 10 Watts (Pa.) 130 (1840). Of a count in debt on a specialty. Sprowl v. Lawrence, 33 Ala. 674, 692 (1859); Taylor v. Auditor, 2 Ark. 174, 187 (1840); Lindsay v. McInerney, 62 N. J. Law, 524, 41 Atl. 701 (1898); Wiley v. Cannon, 8 Humph. (Tenn.) 10 (1847). And of a count in covenant. Leon v. Kerrison, 47 Fla. 178, 36 South. 173 (1904); Harris v. Campbell, 4 Dana (Ky.) 586 (1836); Carter v. Denman, 23 N. J. Law, 260, 275 (1852) semble.

558, with interest from the 4th of January, 1838, against one A. K. Smith, levied the same on certain slaves as his property. Whilst the slaves were thus under levy, Gordon, in consideration of the natural love and affection which he bore to his sister, she being the wife of said A. K. Smith, and for other considerations, contracted and agreed with Smith, both verbally and in writing, dated the 12th March, 1842, to become the purchaser of the slaves at the marshal's sale, and on the 11th March, 1842, did become the purchaser at that sale of the slaves, at the sum of $4,832. It was further agreed to leave the slaves in the possession of Smith until the 1st of January, 1844. It was further agreed, that on the payment of the said sum of $4,832 by Smith to Gordon, on the 1st January, 1844, that the said slaves should revest in, and the title be reconveyed to the said Smith. Gordon and Smith both departed this life previous to the 1st January, 1844, and previous to any payment of the said sum, and after the death of Smith, the slaves went to the possession of the defendants as administrators of his estate, as did also the written agreement evidencing the said contract for reconveyance. On the 26th December, 1843, the defendants, with a view to carry out the said contract, tendered to the said plaintiff, as the executor of Gordon, the sum of $4,832. This tender the plaintiff refused, and the said slaves, on the 1st January, 1844, were, and ever since then have remained in the possession of the defendants.

On the 1st January, 1844, the plaintiff demanded the slaves from the defendants, and afterwards, on the 12th December, 1844, commenced an action of detinue against the defendants to recover the same in the circuit court of Wilcox county. To this action the defendants pleaded the tender aforesaid, and by reason of this plea and the proof to sustain it, a verdict was found for the defendants at the spring term, 1846.

The declaration then proceeds with the averment that the defendants have never paid the plaintiff the said sum of $4,832 so tendered as aforesaid, but that they still hold the same as his money as executor. Also that the estate of Smith was represented by the defendants as administrators to be insolvent, and it was so declared by the proper court. That in the schedules, &c. of this report, no return was made of said money as assets of Smith's estate. It then proceeds to aver a demand of the said sum from the defendants on the 1st January, 1846, and their promise to pay the plaintiff as executor, and concludes with a super se assumpsit.

The defendants demurred to this declaration, and the court gave judgment in their favor. This is the only error assigned.

GOLDTHWAITE, J. 1. The pleader here, instead of relying on the general allegations that the defendants have received money to his own use or admitted their indebtedness by an account stated, has preferred to state the facts from which he deduces their indebtedness as a legal conclusion. We are not aware of any sufficient reason why this course may not be pursued, as, when all is said against it, no

other question is presented by the demurrer than would be if the same facts were shown in evidence and a general charge demanded as to their sufficiency to entitle the plaintiff to recover on the common counts. We shall therefore proceed to consider whether the facts stated authorise the party suing the defendants personally, and not in their representative character.[86]

2. The result of the allegations is, that the plaintiff's testator entered into a contract to convey the title to certain slaves to the defendant's intestate, if a certain sum of money was paid him at a certain time—that this money was tendered by the defendants, as administrators, to the plaintiff as executor—that it was refused by him—and that this refusal had the effect to destroy his title as executor to the slaves, as well as to vest them in the defendants as administrators of their intestate. The legal question presented is, whether the defendants by this act of tender are to be held responsible in their individual capacity for the money which the plaintiff then refused to accept, but which he subsequently demanded.

There is no question that the effect of the tender was to revest the title to the slaves agreed to be conveyed on the payment of the specified sum at the appointed time. This is one of the points decided in Sewall v. Henry, 9 Ala. 24. The consequence of the reinvesting of the title is, that the plaintiff by the same act became invested with the title to the money. Thus, in Lamb v. Lathrop, 13 Wend. 95, there had been a contract to deliver specific articles, and although the court considered the contract was at an end when the articles were tendered, yet they held the effect of the tender and refusal was to create the relation of bailor and bailee between the parties. By the tender in this case the money which previously belonged to the estate of Smith became the property of the estate of Gordon, and the defendants, after the tender, held it, not in their capacity of administrators of Smith, but as individual bailees of the plaintiff as executor of Gordon. In this view it seems clear the action is sustainable against the defendants as individual bailees of the money, and that as such they are responsible to the executor of Gordon.

Judgment reversed and cause remanded.

[86] Simmonds v. Parminter, 1 Wilson 185 (1747); White's Ex'r v. Woodruff, 1 Root (Conn.) 309 (1791); Gooding v. Hingston, 20 Mich. 439 (1870); Tregent v. Maybee, 54 Mich. 226, 19 N. W. 962 (1884); Hersey v. Northern Assur. Co., 75 Vt. 441, 56 Atl. 95 (1903); Maloney v. Barr, 27 W. Va. 381 (1886); Houston v. McNeer, 40 W. Va. 365, 22 S. E. 80 (1895). Accord.

The special facts alleged must show a debt. Lyon v. Alvord, 18 Conn. 66, 79 (1846); McIntyre v. Thompson, 14 Ill. App. 554 (1884); Hall v. Smith, 17 Va. 550 (1811).

The count must state a promise. Smith v. Cox, 11 M. & W. 475 (1843: possibly special assumpsit); Ferguson v. Rhoades, 7 Blackf. (Ind.) 262 (1844); Candler v. Rossiter, 10 Wend. (N. Y.) 488 (1833); Wingo v. Brown, 12 Rich. (S. C.) 279 (1859); Charleston, Town of, v. Stacy, 10 Vt. 562 (1838); Cooke v. Simms, 6 Va. 39 (1799). Also a breach. Metcalf v. Robinson, Fed. Cas. No. 9,497 (1841).

WAID v. DIXON.

(Supreme Court of Appeals of West Virginia, 1904. 55 W. Va. 191, 46 S. E. 918.)

Error to Circuit Court, Greenbrier County; J. M. McWhorter, Judge.

Action by William S. Waid against John T. Dixon. Judgment for plaintiff, and defendant brings error. Reversed.

DENT, J. John T. Dixon, defendant, complains of a judgment of the circuit court of Greenbrier county in favor of William S. Waid for the sum of $362.50, rendered the 4th day of May, 1903.

The first error relied on is the overruling of the demurrer to the declaration, and each count or allegation thereof. The declaration is as follows, to wit:

"The State of West Virginia. In the Circuit Court of Greenbrier County, to wit: Wm. S. Waid complains of John T. Dixon, defendant, of a plea of trespass on the case, for this, to wit: That whereas, on the ——— day of January, 1899, the defendant, John T. Dixon, then and still a resident of the said county and state, was the owner of large tracts of timbered lands lying in the county of Buchanan and Russell, in the state of Virginia, and also the owner of a valuable steam engine, sawmill, and fixtures complete and ready for sawing and manufacturing logs into lumber. That on the 19th day of January, 1899, aforesaid, the said defendant induced said plaintiff to agree to go upon said tracts of land and saw and manufacture all the logs put to said sawmill into lumber, and entered into a contract with plaintiff by which defendant leased or hired his said sawmill and fixtures, engine, etc., to said plaintiff for twelve months at the price of eleven hundred dollars, and on the same day the said defendant, John T. Dixon, through his agent, and in the name of his agent, John C. Hunter, entered into a contract with this plaintiff whereby plaintiff agreed to saw and stack all the oak and poplar timber bought of Albert Pack, trustee, and others, and located on Grisson creek, in Buchanan county, Virginia, for said defendant, John T. Dixon, at the price of $3.50 per M for common and better oak, $2.75 for common and better poplar, and $1.38 for poplar culls, to be paid by the defendant to the plaintiff each month on the 20th of the month following that on which the lumber was sawed. That said contracts were made and entered into at Ronceverte, in the county of Greenbrier, aforesaid. That under the contract aforesaid with said defendant the said steam engine, sawmill, and fixtures were to become the property of plaintiff at the expiration of the said twelve months. That said plaintiff, in pursuance of said contract, at great cost and expense to him, went at once and took possession and control of said engine, sawmill, and fixtures, and set the same as directed by the defendant on defendant's land at Grisson creek, in the county of Buchanan, as aforesaid, and sawed at the least five hundred

thousand feet of lumber of the classes and grades set forth in said contract, and as ordered and directed by defendant. That in May, 1899, plaintiff in pursuance of the order and direction of defendant, moved his said engine, sawmill, and fixtures to a second set on said land on Grisson's creek, and at said second set sawed for defendant at the least six hundred thousand feet of lumber of the classes and grades set forth in said contract, and as directed by the defendant, and at his request. That about the 1st of September, 1899, and while plaintiff was sawing at said second set with hands employed, said defendant ordered the sawing to stop, and the mill to be closed for two months, without the consent and over his protest, and to his injury, loss, and damage. That in November, 1899, the defendant ordered the engine, sawmill, and fixtures to be moved and set up at Bartontown, or near there. That plaintiff, at heavy costs moved the said engine, sawmill, and fixtures in pursuance of said directions, and at the request of said defendant, and set the same up at the place near said Bartontown, where he operated until April, 1900, sawing at this set at least five hundred thousand feet of lumber of the classes and grades set forth in said contract, and as directed and requested by said defendant. That in April, 1900, at the request and directions of said defendant, plaintiff again moved said engine, sawmill, and fixtures, at great cost and expense, to Hart creek, in Russell county, Virginia, and then again set up the same at defendant's land, and operated until July, 1900, and at this set sawed at the least two hundred and fifty thousand feet of lumber of the classes and grades named in said contract, and as directed and requested to do by said defendant. That at all of said sets, and at each one of them, plaintiff sawed the lumber and trimmed the same in a workmanlike manner, and as required by his contract, and in every way complied with his contract, but the defendant did not in any instance comply with his part of the contract. Plaintiff further avers: That about the last of July, 1900, said defendant stopped logging the mill, and ordered said sawing to stop, and said sawmill to be closed down, at a time when plaintiff had men employed and at work, without plaintiff's consent or agreement, and refused to allow plaintiff to complete the job at that set, estimated at one million feet of lumber, to the great injury, loss, and damage to plaintiff. Plaintiff further avers that at the expiration of the twelve months set out in the said contract, to wit, on the 19th day of January, 1900, he, by and with the consent of said defendant, took complete possession and control of said steam engine, sawmill, and fixtures, and absolute ownership of the same. That when said defendant ordered the work to stop and the mill closed in July, 1900, he represented to plaintiff that the work would only be stopped about two months, and then resumed. That defendant would see and undertook that the steam engine, sawmill, and all the machinery and fixtures attached and belonging thereto would be properly and safely taken care of and kept in good condition and ready for work when the work began at the expiration of said

two months. That at the expiration of said time plaintiff was ready to resume the work of sawing, but defendant refused to permit plaintiff to resume work, and refused to do anything to carry out his part of the contract. Plaintiff further avers: That the defendant failed, neglected, and refused to furnish plaintiff means to carry on his work of sawing under the contract, as defendant was bound and agreed to do; and in consequence of said neglect, failure, and refusal of said defendant to furnish plaintiff with such means plaintiff, in order to carry on the work for defendant, was compelled to seek credit to meet his expenses, and to mortgage the said steam engine, sawmill, machinery, and fixtures by giving deed of trust thereon, and that said steam engine and sawmill was sold away from plaintiff to meet the debts so incurred at the price of $300. That said defendant, instead of seeing that said steam engine, sawmill, machinery, and fixtures were well cared for and protected, and kept safe and in good condition, as he agreed to do, permitted, as plaintiff is informed, John Hunter and David Gambell to use and occupy the mill and saw with, and permitted said engine, sawmill, machinery, and fixtures to stand out in the weather unprotected, so that the belting and many valuable parts of the mill and machinery were carried away, stolen, and destroyed, to such an extent that the whole that was left thereof was sold at said sum of $300; and all this entailed heavy loss, injury, and damage to plaintiff, to wit, $3,000. Plaintiff avers that he kept and performed his contract in every particular, and was always ready and willing to fulfill his part of the contract in every particular; that the lumber he sawed was taken by defendant and placed upon the market, or taken into the possession of said defendant; that said defendant kept monthly estimates of the lumber; and, although plaintiff sawed nearly two millions of feet of lumber for defendant, defendant has not settled for the same, or accounted to plaintiff, although often requested to do so. Yet the said defendant, so being informed of the amount and value of the lumber sawed by plaintiff, and of his obligations under said contract to plaintiff, and utterly disregarding the rights of plaintiff in neglecting, refusing and failing to furnish plaintiff means to carry on his work under said contract, and in refusing to permit plaintiff to finish the job of sawing at Hart's creek, and ordering the work to stop and the mill to be closed, and refusing and failing to allow plaintiff to resume that work and complete the job of sawing, and in neglecting, failing, and refusing to look after and take care of said engine, sawmill, machinery, and fixtures as he agreed to do, and permitting the same to be used and the belting and other parts of the machinery and fixtures to be carried away, stolen, and destroyed, and in refusing to account to plaintiff and pay for the lumber sawed for him by the plaintiff, and in neglecting, refusing, and failing to carry out his contract and furnish plaintiff means to keep up his work, and thereby forcing plaintiff to suffer his valuable machinery to be taken from him and sold, and in depriving plaintiff of the labor and profits he was justly entitled to

possess and enjoy by sawing the timber left unsawed at Hart's creek when defendant ordered the work stopped, but wholly neglected so to do. And by reason of all this bad care, negligence, and default of said defendant in complying with his contract and obligations to plaintiff, as hereinbefore set forth, although often requested so to do, said plaintiff has been greatly wronged, and caused to pay out money, and suffer great injury, loss, and damage to the said plaintiff three thousand dollars. And therefore he sues. John W. Arbuckle, P. Q."

From an inspection of this declaration it is impossible to say whether the draftsman thereof intended it to be a declaration for trespass on the case or trespass on the case in assumpsit. In form it is a commingling of the two actions, while the substance thereof and the account filed therewith are proper only in an action of assumpsit. The difference between the two actions is that case is for damages occasioned by wrongful action or negligence, while assumpsit is damages for failure to perform, or breaches of promises, express or implied by law. In the latter the promise is the gist of the action, and where there is no promise alleged on the part of the defendant the declaration is fatally defective, for it presents no averment on which the defendant can take issue by the plea of nonassumpsit. 2 Tuck. Com. 143; Wolf v. Spence, 39 W. Va. 491, 494, 20 S. E. 610; 4 Minor's Institutes, pt. 1, p. 577; 2 Chit. Pl. 279; 1 Rob. Forms, 527; Sexton v. Holmes, 17 Va. 566; Winston's Ex'rs v. Francisco, 2 Va. 189; Hogg's Pleading and Forms, p. 72, § 84. It would have been a very easy matter for the plaintiff to have made this declaration good in assumpsit by having added after the matter of inducement and consideration "that by reason whereof the defendant became indebted to and liable to the plaintiff in the sum of $———, and, being so indebted, he, in consideration thereof, undertook and faithfully promised to pay the same to the plaintiff on request, yet the defendant, though often requested, hath not paid the same, but refuses, to the damage of the plaintiff $———, and therefore he sues," or words to the same effect averring a promise on the part of the defendant. It does not make any difference whether the defendant ever made any such promise, nor is it necessary to prove it. All that is necessary to prove is a liability under the allegations of the declaration, and the law implies the promise if it is properly alleged. Nor is such promise rendered unnecessary by section 29, c. 125, Code 1899, for such section was not intended to do away with the common-law forms of pleading, or destroy the essential characteristics of the different kinds of actions, as these are highly necessary to promote the ends of justice. The declaration being bad because of the want of the necessary allegation of promise on the part of the defendant, the demurrer thereto should have been sustained, and plaintiff should have been required to amend his declaration so that a proper issue thereon could have been joined. There is no misjoinder of action, for the plaintiff has the right to recover in an action of assumpsit for the various matters averred in the declaration when he properly amends the

same to conform to an action of trespass on the case in assumpsit or on promises. This seems a technical matter on which to reverse the case, but, according to long established principles of law calculated to promote justice and a fair trial between litigants, and precedent firmly established, the court cannot do otherwise.

The judgment is reversed, the verdict of the jury set aside, and the case is remanded to the circuit court, with leave to the plaintiff to amend his declaration.[87]

SECTION 3.—DEFENSES

PLEA OF GENERAL ISSUE IN ASSUMPSIT.

(Martin, Civil Procedure, 385. Form 51.)

In the Common Pleas.

C. D. v. A. B. } And the said defendant by E. F. his attorney, comes and defends the wrong and injury when, &c. and saith that he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him, and of this he puts himself upon the country, &c.

PLEA OF THE STATUTE OF LIMITATIONS.

(3 Chitty, Pleading [13th Am. Ed.] pp. *906, *907, *941.)

In the King's Bench.

——— Term, 1 Will. 4.

C. D. ats. A. B. } And the said defendant by E. F. his attorney, comes and defends the wrong and injury, when, &c. and says that the said plaintiff ought not to have or maintain his aforesaid action thereof against the said defendant because he says, that the several supposed causes of action in the said declaration mentioned, (if any

[87] Smith v. Cox, 11 M. & W. 475 (1843: possibly general assumpsit). Accord. Starkey v. Cheeseman, 1 Salk. 128 (1700); Kelly v. Owen, Minor (Ala.) 252 (1824); Massachusetts Ins. Co. v. Kellogg, 82 Ill. 614 (1876: except possibly on special demurrer); Keyes v. Binkert, 48 Ill. App. 259, 265 (1892). Contra.

When the allegations in special assumpsit show a common-law debt, a fictitious promise and breach must be alleged. Buckler v. Angell, 1 Keble 878 (1665); Clark v. Reed, 12 Smedes & M. (Miss.) 554 (1849) semble. Accord. Henderson v. Howard, 2 Ala. 342 (1841) semble; Candler v. Rossiter, 10 Wend. (N. Y.) 487 (1833) semble; Beardsley v. Southmayd, 14 N. J. Law, 534, 543 (1835) semble. Contra.

such there were or still are,) did not, nor did any or either of them accrue (to the said plaintiff) at any time within six years next before the exhibiting of the bill of the said plaintiff, against the said defendant in this behalf, in manner and form as the said plaintiff hath above thereof complained against him the said defendant. And this, the said defendant is ready to verify, wherefore he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

WARD et al. v. ATHENS MINING CO

(Appellate Court of Illinois, 1901. 98 Ill. App. 227.)

HIGBEE, J., delivered the opinion of the court.[88]

This was a suit in assumpsit brought by appellants, constituting a firm known as Ward Brothers, who were retail coal dealers in Peoria, Illinois, against appellee, a corporation engaged in mining coal at Athens, Illinois. On October 4, 1899, appellants entered into a written contract with the board of school inspectors of the city of Peoria to furnish all the coal required for the various school buildings in said city, for the year ending June 1, 1900. The coal was to be from the Athens mine. * * *

Appellants then applied to Lee Kincaid, appellee's manager, for coal to fill the contract. Kincaid agreed, on behalf of appellee, to furnish the coal free on board cars in Peoria at $1.30 per ton for the mine run coal. Frank H. Ward, representing appellants, said it would take two car loads per day to fill his contract and Kincaid agreed to furnish that amount. * * * Under the contract four car loads of coal were shipped by appellee, two on October 10 and two on October 11, 1899, and turned over to appellants. Of these four cars, one was sold and delivered by appellants to one of their customers named Luthy and the others delivered to the parties hauling for the school inspectors. * * * It was at once learned by the school board that part of the coal shipped to Mr. Lynch [89] for them had been diverted to other uses and Mr. Stevens, a member of the board, immediately notified appellants that their action was unsatisfactory; that the contract was canceled and that the board would not take any more coal from them. Notice of the condition of affairs also came to the knowledge of Kincaid and he thereupon refused to furnish appellants any more coal. Athens coal was, however, delivered to the schools by other parties to the amount of about 2,250 tons. After the expiration of the school year, appellants brought this suit against the mining company, Lee Kincaid and H. W. Lynch, to recover damages for the failure of the company to deliver the coal under the contract between them.

[88] Part of the opinion omitted.

[89] Mayor of Peoria.

The declaration contains two special counts based upon the oral contract between appellants and appellee for the delivery of coal as above set forth, its breach alleging also special damages arising out of the inability to fill the contract of appellants with the school inspectors. The declaration also contains the common counts. The only pleas filed were the general issue and denial of joint liability. Upon the trial the case was dismissed as to Kincaid and Lynch, so that the only plea left in force was that of the general issue.

Appellants claim that they had a profit of 32½ cents a ton under their contracts with appellee and the school inspectors, and that they are entitled to that much upon each ton of coal used by the school inspectors during the year. The jury before which the case was tried found the issues for the appellee and there was a judgment against appellants for costs.

Appellants insist that under a plea of the general issue a rescission of the contract for their default cannot be proven. This position, however, is not correct. The plea of general issue puts upon the plaintiff the burden of not only proving the contract as alleged,[90] but also the breach as assigned in the declaration.[91] Under the general issue in assumpsit the defendant may give in evidence that the contract was void or avoidable in law. Or if good in point of law, that it was performed by payment or otherwise; or if unperformed, that there was some legal excuse for the non-performance of it as a release or discharge before breach or non-performance by the plaintiff of a condition precedent,[92] etc. * * * In short, the question in assumpsit upon the general issue is whether there was a subsisting

[90] The promise is in issue. Mahaiwe Bank v. Douglass, 31 Conn. 170 (1862: instrument sued on in altered form); Ingraham v. Luther, 63 Ill. 446 (1872: contract made with a third party); Strong v. Linington, 8 Ill. App. 436 (1881: fraud as to contents); Wilson v. Black, 6 Blackf. (Ind.) 509 (1843: denies indorsement of note by defendant); Gray v. Tunstall, Fed. Cas. No. 5,730 (1847: denies execution of note); Brown v. Pt. Pleasant, 36 W. Va. 290, 301, 15 S. E. 209 (1892: agent of city acting ultra vires) semble. Accord. Tillman v. Ailles, 5 Smedes & M. (Miss.) 373, 43 Am. Dec. 520 (1845: denial of indorsement). Contra. So of contracts sued on by using the common counts. Jones v. Blane, 5 Blackf. (Ind.) 28 (1838); Berringer v. Lake Superior Iron Co., 41 Mich. 305, 2 N. W. 18 (1879) semble; Cargill v. Atwood, 18 R. I. 303, 27 Atl. 214 (1893).

The consideration alleged is in issue. Lampleigh v. Brathwait, Hob. 105 (1615); McCreary v. Jaggers, 3 McCord (S. C.) 473 (1826) semble.

The existence of a quasi contract is in issue. Wilson v. Wagar, 26 Mich. 452 (1873); Hantz v. Sealy, 6 Bin. (Pa.) 405, 410 (1814); Harlow v. Dyer, 43 Vt. 357 (1871); James v. Aiken, 47 Vt. 23 (1874).

[91] See Farr v. Payne, 40 Vt. 615 (1868).

[92] The fulfillment of conditions is in issue. Collins v. Montemy, 3 Ill. App. 182 (1878: days of grace on note not expired); Hoffmann v. Exposition, 55 Ill. App. 290 (1894: misconduct by servant); Clark v. Holway, 101 Me. 391, 64 Atl. 642 (1906: failure to deliver timber agreed upon) semble; Grieb v. Cole, 60 Mich. 397, 27 N. W. 579, 1 Am. St. Rep. 533 (1886: failure to deliver machine agreed upon); Sisson v. Willard, 25 Wend. (N. Y.) 373 (1841: same as last); Scott v. Coal Co., 89 Pa. 231, 239, 33 Am. Rep. 753 (1879: failure to deliver coal agreed upon); Stitzer v. U. S., 182 Fed. 513, 105 C. C. A. 51 (1910: by statute six months had to elapse after default before suit

debt or cause of action at the time of commencing the suit. * * * Formerly, matters in discharge of the action must have been pleaded specially; afterward a distinction was made between express and implied assumpsits. In the former these matters were still required to be pleaded but not in the latter.[93] At length, about the time of Lord Holt, they were universally allowed to be given in evidence under the general issue. 1 Tidd's Practice, 591, and note N. Almost anything which goes in discharge of a promise is admissible in evidence under the general issue, so any matter which shows that the plaintiff never had a cause of action may be given in evidence under the plea of non-assumpsit, and most matters in discharge of the action, which show that at the commencement of the suit there was no subsisting cause of action, may be taken advantage of under this issue. Puterbaugh's Pl. and Pr. 173, and cases cited. It was, therefore, proper to permit evidence on the part of appellee tending to show that appellants had by their action used the coal for purposes not provided for by the contract; that they had thereby forfeited the school contract, rendering it impossible for appellee to fulfill the contract to furnish coal for the school through appellants, and that the contract was, therefore, necessarily rescinded. * * *

We find no reason in the record for reversing the judgment of the court below, and it is accordingly affirmed.[94]

possible—had not elapsed). Accord. Runyan v. Nichols, 11 Johns. (N. Y.) 547 (1814: inefficiency and neglect by a lawyer). Contra.

So where the common counts are used. Rainey v. Long, 9 Ala. 754 (1846: debt not due); Collins v. Montemy, 3 Ill. App. 182 (1878: same; good discussion); Gaw v. Wolcott, 10 Pa. 43 (1848: work poorly done); B. & O. Ry. v. Polly, 14 Grat. (Va.) 447, 452 (1858: work not done).

[93] Fitz v. Freestone, 1 Mod. 210 (1675); Wells v. Needham, 2 Lutw. 995 (1697); Ripley v. Fitch, 1 Root (Conn.) 404 (1792). See, also, 1 Chitty, Pleading (13th Am. Ed.) *473.

[94] Matters in excuse may be proved under nonassumpsit. The cases are numerous. Illustrations of the various excuses are cited. Special assumpsit. Bernard v. Saul, 1 Str. 498 (1722: illegality); Candy v. Twichel, 2 Root (Conn.) 123 (1794: duress); Harrison v. Thackaberry, 248 Ill. 512, 94 N. E. 172 (1911: release of surety by giving time to principal); Am. Ins. Co. v. Assn., 81 Ill. App. 258 (1899: violation of conditions of insurance policy); Fuller v. Bartlett, 41 Me. 241 (1856: coverture); Keystone Co. v. Forsyth, 126 Mich. 98, 85 N. W. 262 (1901: breach of collateral stipulation); Robinson v. Batchelder, 4 N. H. 40 (1827: modification of contract); Sill v. Rood, 15 Johns. (N. Y.) 230 (1818: fraud); Wilt v. Ogden, 13 Johns. (N. Y.) 56 (1816: prevention by plaintiff); Edson v. Weston, 7 Cow. (N. Y.) 278 (1827: goods taken by paramount title); Stansbury v. Marks, 4 Dall. (Pa.) 130, 1 L. Ed. 771 (1793: infancy); Craig v. Missouri, 4 Pet. 410, 426, 7 L. Ed. 903 (1830: consideration true, but invalid, because of other facts); University v. Baxter, 42 Vt. 99, 102 (1869: consideration, though presumed, lacking); Brown v. Pt. Pleasant, 36 W. Va. 290, 302, 15 S. E. 209 (1892: nonperformance of implied conditions where consideration presumed). Accord. Rose v. Mortimer, 17 Ill. 475 (1856: same as last case above; by statute as construed); Ward v. Reed, 134 Mich. 392, 96 N. W. 438 (1903: fraud; under Cir. Ct. Rule 7); Monson v. Beecher, 45 Conn. 299 (1877: coverture; under statute requiring all affirmative defenses to be pleaded). Contra.

Common counts. Darby v. Boucher, 1 Salk. 279 (1693: infancy); Wilson v. King, 83 Ill. 232 (1876: failure of consideration; despite Rose v. Morti-

YOUNG v. RUMMELL.

(Supreme Court of New York, 1842. 2 Hill, 478, 38 Am. Dec. 594.)

Error to Erie C. P. Rummell sued Young before a justice and declared in assumpsit. Plea, the general issue. The plaintiff recovered and the defendant appealed to the common pleas. On the trial in that court, the defendant offered to prove that the plaintiff had before brought a suit against the defendant for the same cause of action and proceeded therein to a trial and judgment. The court rejected the evidence, on the ground that the former recovery should have been pleaded, and was not admissible under the general issue. The defendant excepted, and now brings error—judgment having been rendered for the plaintiff in the court below.

BRONSON, J.[95] Although in point of form, the plea of non-assumpsit puts nothing in issue but the making of the promise, it has been long settled that nearly every defence is admissible under that plea which shows that there was not a subsisting cause of action at the time the suit was brought. Tender and set-off, which must be pleaded specially, are not exceptions to the rule, because those defences admit a good cause of action. There are some defenses arising by operation of law, as a bankrupt or insolvent's discharge, and the statute of limitations, which are exceptions to the general rule. But there are other defences of the same character which need not be specially pleaded. Clark v. Yale, 12 Wend. 470. When the bar arose by the act or assent of the plaintiff, there is, I think, no case where the matter may not be given in evidence under the plea of non-assumpsit. I am aware that there is one decision and some dicta in our books to the contrary; but they stand opposed to the whole current of authority. In Fowler v. Hait, 10 Johns. 111, the action was upon contract, and evidence of a former trial and judgment between the same parties was held inadmissible under the general issue. The same thing was said in Dexter v. Hazen, 10 Johns. 246, and Brown v. Wilde, 12 Johns. 455; but in neither of these cases was the point necessarily involved in the decision. No authority was cited, and the only reason assigned for the decision in Fowler v. Hait, was, that "it would produce surprise on the part of the plaintiff, and injustice, if the defendant were allowed to set up, at the trial, special matter in bar of which no notice had been previously given to the plaintiff." That reason applies in all its force to every case where the defence admits a valid promise, and sets up some new matter in discharge of the action, such as payment, release, foreign attachment, accord and satisfaction, arbitrament, and the like; and I need not cite cases to

mer, 17 Ill. 475 [1856] above); McCrea v. Parsons, 112 Fed. 917, 50 C. C. A. 612 (1902: illegality); Limerick Bank v. Adams, 70 Vt. 132, 40 Atl. 166 (1897: fraud).

[95] Part of the opinion omitted.

prove that these defences are admissible under the plea of non-assumpsit. The point has been decided, and the objection upon which the decision turned in Fowler v. Hait, has been disregarded a hundred times. That case was virtually overruled in Wilt v. Ogden, 13 Johns. 56, and Sill v. Rood, 15 Johns. 230, where the decision went upon the general doctrine, that "matters in discharge of the action, which show that at the time of the commencement of the suit the plaintiff had no subsisting cause of action, may be taken advantage of under the general issue." The court cited Chitty, at the very page where, among other things, he says a former recovery for the same cause may be given in evidence under non assumpsit, without suggesting any doubt that such was the correct rule. * * *

In Coles v. Carter, 6 Cow. 691, it was held, that a former recovery could not be given in evidence under the general issue; but the action was trespass, where all matters of defence which admit the original wrong must be specially pleaded. * * *

The court below erred in rejecting the evidence which was offered, and there must be a venire de novo.

Judgment reversed.[96]

GOWLAND v. WARREN.

(Court of King's Bench, 1808. 1 Camp. 363.)

Assumpsit for use and occupation, money paid, &c.—the general issue.

The plaintiff's case being made out,—

Taddy proposed to give in evidence the certificate obtained by the defendant under a commission of bankruptcy issued against him since the cause of action accrued. He contended that although it was usual to plead bankruptcy, it never had been decided that this was necessary, and that the words of the statute which allow bankruptcy to be pleaded in a particular form do not prevent the defendant from

[96] Warren v. Comings, 6 Cush. (Mass.) 103 (1850); Carvill v. Garrigues, 5 Pa. 152 (1847); Mason v. Eldred, 6 Wall. (U. S.) 231, 18 L. Ed. 783 (1867); Ins. Co. v. Harris, 97 U. S. 331, 24 L. Ed. 959 (1877). Accord.

Other defenses in discharge are admissible under the general issue. Special counts. Howley v. Peacock, 2 Camp. 558 (1811: release); Gunn v. Howell, 35 Ala. 144, 159, 73 Am. Dec. 484 (1859: obligation taken on foreign attachment); Osgood v. Spencer, 2 Har. & G. (Md.) 133 (1828: debt joint and death of defendant's testator); Drake v. Drake, 11 Johns. (N. Y.) 531 (1814: payment); Bradley v. Field, 3 Wend. (N. Y.) 272 (1829: defendant arrested for debt and discharged from custody); Clark v. Yale, 12 Wend. (N. Y.) 470 (1834: payment by another also liable); Kennedy v. Ferris, 5 Serg. & R. (Pa.) 394 (1819: plaintiff's right ceased by passing to assignees in bankruptcy). Common counts. Bucknall v. Swinnock, 1 Mod. 7 (1669: accord and satisfaction); Stafford v. Clark, 2 Bing. 377 (1824: former recovery); Minard v. Lawler, 26 Ill. 301 (1861: debt garnisheed; good discussion) semble; Shaw v. Moon, 49 Vt. 68 (1876: payment).

giving the special matter in evidence under the general issue of non assumpsit.

Lord ELLENBOROUGH. This course has never before been attempted; and I should be extremely sorry to sanction it. No one could go to trial with safety, if a bankruptcy could be thus suddenly started upon him. The nature of the defence, however, seems to me decisive against permitting it to be taken advantage of under the general issue. Bankruptcy in the defendant does not shew that the plaintiff never had any cause of action, or that his demand has been cut down. The debt still exists, and the certificate only operates as a special discharge from it under the statute. The party, therefore, can avail himself of this discharge only in such manner as the statute has provided.

Verdict for the plaintiff.[97]

BALTIMORE & O. R. CO. v. POLLY, WOODS & CO.

(Court of Appeals of Virginia, 1858. 14 Grat. 447.)

MONCURE, J.[98] By articles of agreement, in writing but not under seal, entered into between the appellees Polly, Woods & Co. and the appellant, the Baltimore and Ohio Railroad Company, on the 1st day of February, 1851, the appellees agreed, in consideration of the payments therein mentioned, to graduate and prepare for the laying down of the railway tracks thereon, the 172d section of said road, according to the manner and conditions set forth in the agreement. The work was to be completed on or before the 1st of October, 1852; and for doing it certain prices were agreed to be paid for the different kinds of work, as classified in the agreement. Then follows a clause in the agreement in these words: "The above payments shall be made in the following manner; that is to say, during the progress of the work, and until it is completed, there shall be a monthly estimate made by the aforesaid engineer (meaning the local or resident engineer having charge of the particular work for the time being), of the quantity, character and value of the work done during the month, or since the last monthly estimate, four-fifths of which value shall be paid to the said parties of the first part, at such places as the chief engineer may appoint; and when the said work is completed and so accepted

[97] Stedman v. Martinnant, 12 East, 664 (1810); Sessions v. Phinney, 11 Johns. (N. Y.) 162 (1814) semble. Accord.

So of the statute of limitations. Special counts. Gould v. Johnson, 2 Ld. Raym. 838 (1703); Jockisch v. Hardtke, 50 Ill. App. 202 (1893); Smart v. Baugh, 3 J. J. Marsh. (Ky.) 363 (1830) semble; Whitworth v. Pelton, 81 Mich. 98, 45 N. W. 500 (1890) semble; Heath v. Page, 48 Pa. 130 (1865: possibly case). Common counts. Robbins v. Harvey, 5 Conn. 335, 343 (1824); Stewart v. Durrett, 3 T. B. Mon. (Ky.) 113 (1825).

Tender and set-off may properly be discussed under partial defenses and cross-demands.

[98] Part of the opinion omitted.

by the said chief engineer, there shall be a final estimate made by the (local or resident) engineer of the quantity, character and value of said work, agreeably to the terms of this agreement, when the balance appearing to be due to the said parties of the first part, shall be paid to them, upon their giving release under seal to the said company, from all claims or demands whatsoever growing in any manner out of this agreement. * * *

A similar agreement was entered into between the same parties on the same day in regard to the 182d section of the said road. * * *

In August, 1853, the appellees instituted an action of assumpsit against the appellant. The declaration contained but two counts, which were the common counts for work and labor, &c. and on an account stated. The bill of particulars filed with the declaration was for the work done on the said two sections of the said road. After various proceedings were had in the action, a verdict was found for the appellees on the general issue, for fifteen thousand six hundred and thirty-two dollars and seventy-six cents, with interest on fifteen thousand one hundred and sixty-one dollars and fifty-four cents from the 4th day of December, 1852, until paid; and judgment was rendered accordingly on the 18th of November, 1854. The appellant obtained a supersedeas to the judgment.

The first error assigned in the petition for the supersedeas, is founded on the first and second bills of exception, taken by the appellant to opinions of the court rejecting three special pleas which were offered on the 23d of June, 1854, and again on the 10th of November, 1854.

In each of these three special pleas, it is averred that the work, &c. mentioned in the first count of the declaration, so far as the same had been done, &c. by the appellees, was so done, &c. under and by virtue of the two written agreements of the 1st of February, 1851.

In the first special plea it is further averred, that a final estimate was made of said work, &c. according to said agreements, amounting to a certain aggregate sum; the whole of which had been paid, except five thousand three hundred and fifty dollars and ninety-nine cents, which the appellant offered to pay into court on account of what is claimed by the appellee in the action, upon receiving their release under seal from all claims or demands growing out of said agreements; and that the appellant is not indebted to the appellees in a greater amount than the sum last mentioned.

In the second plea it is further averred, that the appellees did not complete the work on or before the day of ———; meaning no doubt the day fixed for its completion in the agreements.

In the third plea it is further averred, that at the completion of the work and the acceptance thereof by the chief engineer, as in said agreements provided, a final estimate under each of them was made by the chief engineer, of which the appellees had notice; yet that they would not give to the appellant a release under their seals from

all claims or demands growing out of said agreements, though specially requested by the appellant so to do.

Without expressing any opinion upon the question as to the time of offering these pleas, I think, if they present any defences at all, they amount to the general issue, and were therefore properly rejected. A plea amounts to the general issue when it traverses matter which the plaintiff avers, or must prove, to sustain his action; whether such traverse be direct or argumentative. Indebitatus assumpsit will lie to recover the value of work done under a special contract, if it be fully executed on the part of the plaintiff, and nothing remain to be done under it but the payment of a sum of money by the defendant. The existence of this state of facts raises an implied promise to pay the money. The plaintiff must prove the facts to sustain his action; and a plea traversing any of them or averring facts inconsistent therewith, must therefore amount to the general issue. If the plaintiff in such case should declare specially on the contract, expressly averring the performance of all conditions precedent; a plea denying such performance would of course amount to the general issue. The effect is the same under an indebitatus count, which is allowed in such cases to avoid prolixity in pleading, and which implies an averment of the performance of all conditions precedent, the performance of which is necessary to entitle the plaintiff to maintain his action. Matter which amounts to the general issue cannot be pleaded specially. "But there are instances (says Bayley, J., in Carr v. Hinchliff, 10 Eng. C. L. R. 408) in which the defendant has the option of giving his defence in evidence under the general issue, or of putting it on the record. One of them is when the plaintiff's right of action is confessed and avoided by matter ex post facto; e. g. by a plea of payment, or accord and satisfaction. The other is when the plea does not deny the declaration, but answers it by matter of law;" as for instance, gaming. See also Hayselden v. Staff, 31 Eng. C. L. R. 307; Morgan &c. v. Pebrer, 32 Eng. C. L. R. 202; Cousins v. Padden, 2 Cromp. Mees. & Ros. 547; Jones v. Manney, 1 Mees. & Welsb. 333; Grounsell v. Lamb, 1 Mees. & Welsb. 352; 1 Chit. Pl. 477–479, 526–528, 714, 738, and 742. The defence presented by each of the special pleas in this case is, that the action, though indebitatus assumpsit, is founded on a special contract subject to a condition precedent which has not been performed by the plaintiffs.

But it is contended that the pleas were good, because they set forth matter of law proper for the consideration of the court and not of the jury; and that in every such case the matter may be specially pleaded. I do not understand that any thing can be pleaded specially which amounts to the general issue, whether it be matter of law or not. Infancy, coverture, usury and gaming, are matters of law which may be pleaded specially or given in evidence under the general issue, at the option of the defendant. But they do not amount to the general issue; because they do not traverse any matter which the plaintiff must

prove to sustain his action. They give color of action to the plaintiff, as every good special plea must, although they show that in law he never had a good cause of action. In this respect only they differ from matters in confession and avoidance; which admit that the plaintiff once had a good cause of action, but show that it has since been discharged. All matters of defence which give color of action to the plaintiff, may be pleaded specially; and all matters of defence which do not give such color of action, amount to the general issue, and must be given in evidence under it. 1 Chit. Pl. 526, 530.

That a plea amounts to the general issue, is a sufficient reason for rejecting it, especially when offered out of time and as an additional plea to that of the general issue already pleaded. Warner v. Wainsfort, Hob. R. 127; Gardner v. Webber, 17 Pick. (Mass.) 407.

* * *

The other judges concurred in the opinion of MONCURE, J.

Judgment reversed.[99]

MAGGS v. AMES.

(Court of Common Pleas, 1828. 4 Bing. 470.)

Assumpsit. The first count of the declaration stated that Ann Prickett was indebted to the Howells before they became bankrupt, and was arrested at their suit; that thereupon, in consideration that the Howells (before their bankruptcy) would procure the discharge of Ann Prickett, and take her bill of exchange for the amount of the debt, the defendant undertook to pay the amount of the bill of exchange in case it should be dishonoured by Ann Prickett. Averment of dishonour by Ann, and nonpayment by defendant.

The second count was upon an undertaking to pay the debt for which Ann Prickett was arrested, in consideration of Howells' procuring her discharge.

The defendant pleaded, first, the general issue: the fourth plea was, that the supposed promises and undertakings in the first and second

[99] Sea v. Taylor, 1 Salk. 394 (1704: denial of breach); Little v. Bolles, 12 N. J. Law, 171 (1831: denial of breach); University of Vermont v. Baxter, 42 Vt. 99 (1869: denied consideration); Merchants' & Mechanics' Bank v. Evans, 9 W. Va. 373, 381 (1876: denied promise).

The rule is the same in special assumpsit. Smith v. Hitchcock, Cro. Eliz. 201 (1590: denial of consideration; probably wrong on facts); Taylor v. Sea, Ld. Raym. 968 (1704: denial of breach); Cobb v. Heron, 180 Ill. 49, 54 N. E. 189 (1899: denial of promise); Scribner v. Bullitt, 1 Blackf. (Ind.) 112 (1821: denial of transfer to plaintiff); Bank of Auburn v. Weed, 19 Johns. (N. Y.) 300 (1822: in fact a dilatory defence; denial of incorporation); Sublett v. McLin, 10 Humph. (Tenn.) 181 (1849: generally) semble; University of Vermont v. Baxter 42 Vt. 99 (1869: denial of consideration); Van Winkle v. Blackford, 28 W. Va. 670, 681 (1886: denial of promise) semble. Accord. Dewees v. Insurance Co., 34 N. J. Law, 244, 253 (1870: denial of performance of conditions in insurance policy; decision right) semble; Dibble v. Duncan, Fed. Cas. No. 3,880 (1841: denial of promise argumentatively: semble accord). Contra.

counts respectively mentioned were special promises, and each of them was a special promise for the debt of another person, to wit, the said Ann Prickett; and that no agreement in respect of or relating to the said supposed causes of action in the said first and second counts of the said declaration, or either of them, nor any memorandum or note thereof, wherein the consideration or considerations for the said special promises or either of them was or were stated or shewn, was or is in writing, or was or is signed by the said defendant, or by any other person by him thereunto lawfully authorized.

The last plea was, that long before and at the time when the said Ann Prickett was supposed in and by the first and second counts of the said declaration to have become indebted to the said Thomas Howell and John Howell, and from thence continually until the making of the said supposed promises and undertakings in those counts respectively stated, the said Ann Prickett was the wife of one William Prickett, which said William Prickett at the time of the accrual of the said supposed debt to the said Thomas Howell and John Howell, and during all the time aforesaid, was the husband of the said Ann Prickett and in full life.

To these pleas there was a demurrer, on the ground that they amounted severally to the general issue, and tended to great and unnecessary prolixity of pleading; and also that the defendant had not by those pleas or either of them traversed or denied or attempted to put in issue, any matter of fact alleged by the plaintiff in his first and second counts, but had in each of the pleas respectively introduced and attempted to put in issue matters of fact not alleged nor necessary to be alleged. Joinder.

PARK, J.[1] It may be truly said, that, looking through all the law books, there is not a greater variety of opinions upon any question than what pleas do or do not amount to the general issue, nor any one upon which there is a greater mass of contradictory decisions.

I shall not therefore attempt, though I have looked at many of them to go through or endeavour to reconcile them; I satisfy myself in general with saying, that though perhaps the general issue might answer the purpose, it does not therefore necessarily follow that the demurrer on this ground must be allowed, nor that the defendant was bound to give this matter in evidence under the general issue.

There are many instances in which a defendant has the option of giving his defence in evidence, or of putting it on the record.

And though the facts alleged under the defendant's special plea might have been given in evidence under the general issue,[2] the question is, whether the same facts stated on the record do or do not constitute a good plea.

[1] Part of the opinion omitted.

[2] Ruggles v. Gatton, 50 Ill. 412 (1869: held admissible under denial of a set-off) semble; Meyers v. Schemp, 67 Ill. 469 (1873: common counts); Booker v. Wolf, 195 Ill. 365, 370, 63 N. E. 265 (1902: common counts) semble.

One species of cases in which this may be done is, where the plaintiff's right of action (which is confessed) is avoided by matter ex post facto, as by payment; which may be given in evidence under the general issue, or pleaded. The other case may be, where the plea does not deny the declaration, but answers it by matter of law.

The plea in this case consists not in denying the plaintiff's right of action; it is not a denial of the facts in the declaration, but it is matter of defence in law arising out of the statute of frauds. I think the whole of this doctrine, as to what pleas shall amount to the general issue, has been fully and admirably explained by the Judges Bayley, Holroyd, and Littledale, in the case of Carr v. Hinchliff, 4 B. & C. 547, and which was not quoted to us in this case at the bar on either side.

In the present case it is true, that as it appears to us to be an action brought for the debt, default, or miscarriage of another, the proof must at the trial have been, that such promise was in writing, but still on the face of the declaration, the promise was good. But though, on the general issue, the plaintiff must have proved the writing, the defendant avoids that by shewing in pleading that it was not in writing.[3]

The same observations apply to the fifth plea, the coverture of Ann Prickett. * * *

Judgment for the defendant.[4]

Hamilton v. Thirston, 93 Md. 213, 48 Atl. 709 (1901); Morgart v. Smouse, 103 Md. 463, 63 Atl. 1070, 115 Am. St. Rep. 367 (1906; common counts). Accord. Chicago Co. v. Liddell, 69 Ill. 639 (1873); Lawrence v. Chase, 54 Me. 196 (1866: unless declaration expressly avers writing). Contra.

[3] Myers v. Morse, 15 Johns. (N. Y.) 425 (1818). Accord.

[4] Defenses in excuse may be specially pleaded. Special counts. Tillou v. Britton, 9 N. J. Law, 120, 131 (1827) semble; Dewees v. Insurance Co., 34 N. J. Law, 244, 253 (1870); Dibble v. Duncan, Fed. Cas. No. 3,880 (1841) semble; Morgantown Bank v. Foster, 35 W. Va. 357, 364, 13 S. E. 996 (1891) semble. Accord. Warner v. Crane. 20 Ill. 148 (1858); Potter v. Stanley, 1 D. Chip. (Vt.) 243 (1814); Hatch v. Hyde, 14 Vt. 25, 39 Am. Dec. 203 (1842: by thinking excuse a denial); First Nat. Bank v. Kimberlands, 16 W. Va. 555, 595 (1880) semble. Contra. Common counts. Hussey v. Jacob, 1 Ld. Raym. 87 (1696); Carr v. Hinchliff, 7 D. & R. 42 (1825: leading case). Accord. Little v. Bolles. 12 N. J. Law, 171 (1831) semble; Stotesbury v. Insurance Co., 9 Phila. 210 (1874). Contra.

Defenses in discharge may be specially pleaded. Special counts. Hatton v. Morse, 1 Salk. 394 (1703); Id., 3 Salk. 273 (1703); Dunham v. Ridgel, 2 Stew. & P. (Ala.) 402 (1832) semble; Craig v. Whips, 1 Dana (Ky.) 375 (1833) semble; Frost v. Tibbetts, 30 Me. 188 (1849); Bowman v. Noyes, 12 N. H. 302, 309 (1841) semble; Carvill v. Garrigues, 5 Pa. 152 (1847) semble; Sublett v. McLin, 10 Humph. (Tenn.) 181 (1849); First Nat. Bank v. Kimberlands, 16 W. Va. 555, 574 (1880) semble; Morgantown Bank v. Foster, 35 W. Va. 357, 364, 13 S. E. 996 (1891) semble. Accord. Hackshaw v. Clerke, 5 Mod. 314 (1696). Contra. Common counts. Paramore v. Johnson, 1 Ld. Raym. 566 (1700); Kearslake v. Morgan, 5 T. R. 513 (1794); Carr v. Hinchliff, 4 B. & C. 547 (1825) semble; Gillfillan v. Farrington, 12 Ill. App. 101, 107 (1882) semble; Wheatly v. Phelps, 3 Dana (Ky.) 302 (1835: good discussion); Bird v. Caritat, 2 Johns. (N. Y.) 342, 3 Am. Dec. 433 (1807) semble; Carvill v. Garrigues, 5 Pa. 152 (1847) semble; Morgantown Bank v. Foster, 35 W. Va. 357, 364, 13 S. E. 996 (1891) semble. Accord. Buchnall v. Swinnoc, 1 Mod. 7 (1669). Contra.

CHAPTER II

DEBT

SECTION 1.—SCOPE OF THE ACTION

ANONYMOUS.

(Court of Exchequer, 1668. Hardres, 485.)

In an action for £100. upon a bill of exchange accepted, the plaintiff declared, that by the custom of England, if a merchant send a bill of exchange to another merchant to pay money to another person, and the bill be accepted, that he who accepts the bill, does thereby become chargeable with the sum therein contained; and that a certain merchant drew a bill of exchange upon the defendant, payable to the plaintiff, which bill the defendant accepted; per quod actio accrevit. And upon nil debet pleaded, a verdict passed for the plaintiff; and now it was moved in arrest of judgment by Offley:[1] * * *

2. That an action of debt lies not. * * *

Secondly, An action of debt lies not in this case, because there is no privity betwixt the plaintiff and defendant; nor any contract in deed, or in law; and where these fail, debt lieth not. Vide 19 Hen. 6. Dyer, 21 Rol. 1 Part 594. Where goods are delivered to another at the request of a third person, debt lies not upon a promise to pay for them, nor an indebitatus assumpsit; Otherwise when money is received to another man's use; as when a sheriff levies money upon an execution, tho' he make no return of it, debt lies against him; because he levied and received it to the plaintiff's use: And the law creates a contract there, but not in our case.

Stevens, pro quer': * * * And for the second, it is a rule in law, that where the common law, or any particular custom creates a duty, debt lies for it; as in case of a tailor, who by the common law may have an action of debt, or a quantum meruit for making up a suit of clothes. So in case of a particular custom, as in 11 Hen. 6. 24. a custom of a manor to collect rents, and receive twenty shillings for the same, debt lies for it; yet there is no privity of contract. So he prayed judgment pro quer.

Chief Baron. This is a case of weight and concern for the future and deserves consideration. Declarations upon bills of exchange

[1] Parts of the statement and first point of arguments omitted.

have often varied: Sometimes declarations have been upon a custom amongst merchants only, without laying an express promise: Afterwards they came to declare upon an assumpsit. And after all, if an action of debt will lie, it will be a short cut, and pare off a long recital. For if debt lies, a man may declare upon a bill of exchange accepted in debt, or in an indebitatus assumpsit, for so much money. But for the plaintiff's inferring the custom of the realm into his declaration here, I hold that to be a mere superfluity and redundancy, which does not vitiate the declaration. And without doubt, if the common law, or the custom of a place create a duty, debt lies for it, without more ado; as in the case of a toll due by custom; 20 Hen. 7. 1. and so in cases of a certain sum due by custom for pound breach to the lord of a manor, or to a goaler, for barr fees, Vide 21 Hen. 7.[2] But the great question here is, whether or no a debt or duty be hereby raised: For if it be no more than a collateral engagement, order or promise, debt lies not; as in the case that has been cited, of goods delivered by A. to B. at the request of C. which C. promised to pay for, if the other does not; for in that case a debt or duty does not arise betwixt A. and C. but a collateral obligation only.[3] In our case the acceptance of the bill amounts clearly to a promise, to pay the money; but it may be a question, whether it amounts to a debt or not? For if so, then it is assignable to the king, or by commissioners of bankrupts. And it were worth while to enquire, what the course has been amongst merchants; or to direct an issue for trial of the custom amongst merchants in this case. For although we must take notice in general of the law of merchants; yet all their customs we cannot know but by information. And although the verdict here finds it in effect, and so might seem to inform us; yet it does not appear that the custom was in issue; So that we can have no certain information of the custom by this verdict. Et adjornatur.

2 So debt lies on any quasi contract or other legal duty to pay a "sum certain." Core's Case, Dyer, 20a (1537: recovery back of consideration on rescission for breach of contract); Bonafous v. Walker, 2 T. R. 126 (1787: for an escape after statute made officer's liability definite); Knapp v. Hanford, 6 Conn. 170 (1826: executor's duty to pay legacy); Town of Geneva v. Cole, 61 Ill. 397 (1871: for taxes); Norris v. School Dist. No. 1, 12 Me. 293, 28 Am. Dec. 182 (1835: benefits conferred under contract broken by plaintiff); Van Deusen v. Blum, 18 Pick. (Mass.) 229, 29 Am. Dec. 582 (1836: benefits conferred mistakenly thinking a contract existed); Dowell v. Boyd, 3 Smedes & M. (Miss.) 592, 605 (1844: master's duty to return money converted by slave); Hickman v. Searcy, 9 Yerg. (Tenn.) 47 (1836: duty of joint debtor to contribute); Alsbrook v. Hathaway, 3 Sneed (Tenn.) 454 (1856: where tort waived).

3 Sands v. Trevilian, Cro. Car. 193 (1629); Mires v. Sculthorpe, 2 Camp. 215 (1809); Elder v. Warfield, 7 Har. & J. (Md.) 391 (1826); Tappan v. Campbell, 9 Yerg. (Tenn.) 436 (1836). Accord. The rule is the same, though the contract be under seal. Thursby v. Plant, 1 Saund. 237, 240a (1669) semble; Mills v. Auriol, 1 H. Bl. 433 (1790) semble; Randall v. Rigby, 4 M. & W. 130 (1838); Fletcher v. McFarlane, 12 Mass. 43 (1815) semble.

Precedents were ordered to be searched; and afterwards in Hilary Term, 20 Car. 2. it was moved again, and precedents shewn, that by the opinion of the chief justice debt lay not; and all the clerks in Guild hall certified, that they had no precedent in London of debt in such case.

Afterwards in Hilary Term, 20 & 21 Car. 2. the court declared their opinion, that an action of debt would not lie upon a bill of exchange accepted, against the acceptor: But that a special action upon the case must be brought against him. For that the acceptance does not create a duty, no more than a promise made by a stranger, to pay, &c. if the creditor will forbear his debt. And he that drew the bill continues debtor, notwithstanding the acceptance; which makes the acceptor liable to pay it. And this course of accepting bills being a general custom amongst all traders both within and without the realm, and having every where that effect, as to make the acceptor subject to pay the contents, the court must take notice of that custom; but the custom does not extend so far as to create a debt; only makes the acceptor onerabilis to pay the money. Though custom may give an action of debt, as in 20 Hen. 7. 1. of toll; and so in case of a fine for a copyhold.

Wherefore, and because no precedent could be produced, that an action of debt had been brought upon an accepted bill of exchange, judgment was arrested.[4]

[4] Brown v. London, 1 Vent. 152 (1671: otherwise, if acceptor really received money to use of payee); Webb v. Geddes, 1 Taun. 540 (1809: probably wrong on facts); Smith v. Segar, 3 Hen. & M. (Va.) 394 (1809: undertaking collateral); Wilson v. Crowdhill, 2 Munf. (Va.) 302 (1811: same). Accord. Raborg v. Peyton, 2 Wheat. 385, 4 L. Ed. 268 (1817) semble. Contra.

Cases on whether debt lies by other parties to bills and notes follow.

Indorsee against acceptor. That it does: Planters' Bank v. Galloway, 11 Humph. (Tenn.) 342 (1850); Raborg v. Peyton, 2 Wheat 385, 4 L. Ed. 268 (1817: leading case); Regnault v. Hunter, 4 W. Va. 257, 272 (1870) semble. That it does not: Cloves v. Williams, 5 Scott, 68 (1837).

Drawer against acceptor. That it does: Priddy v. Henbrey, 1 B. & C. 673 (1823); Regnault v. Hunter, 4 W. Va. 257, 271 (1870).

Payee against drawer. That it does: Stratton v. Hill, 3 Price, 253 (1816); Dunlap v. Buckingham, 16 Ill. 109 (1854); Brown v. Hall, 2 A. K. Marsh. (Ky.) 599 (1820); Sharpe v. Fowlkes, 7 Humph. (Tenn.) 512 (1847).

Indorsee against drawer. That it does: Home v. Semple, Fed. Cas. No 6,658 (1843).

Indorsee against his indorser (bill). That it does: Watkins v. Wake, 7 M. & W. 488 (1841); Slacum v. Pomery, 6 Cranch, 221, 3 L. Ed. 205 (1810: also statute). That it does not: Whiting v. King, Minor (Ala.) 122 (1823: obligation collateral).

Payee against maker. That it does: Bishop v. Young, 2 B. & P. 78 (1800); Walrad v. Petrie, 4 Wend. (N. Y.) 575 (1830) semble; Gardner v. Clark, 5 N. C. 283 (1809); Crawford v. Daigh, 2 Va. Cas. 521 (1826). That it does not: Welsh v. Craig, 8 Mod. 373 (1825); Lindo v. Gardner, 1 Cranch, 343, 2 L. Ed. 130 (1803).

Indorsee against maker. That it does: Barclay v. Moore, 17 Ala. 634 (1850); Taylor v. Walpole, 1 Blackf. (Ind.) 378 (1825); Phillips v. Runnels, Morris (Iowa) 391, 43 Am. Dec. 109 (1845); De Proux v. Sargent, 70 Me. 266 (1879); Willmarth v. Crawford, 10 Wend. (N. Y.) 341 (1833); Anderson v.

FLANAGAN v. CAMDEN MUT. INS. CO.

(Supreme Court of New Jersey, 1856. 25 N. J. Law, 506.)

THE CHIEF JUSTICE.[5] This action is founded on a policy of insurance against loss or damage by fire, made by the defendants under their corporate seal, bearing date on the twenty-sixth of June, 1851. The defendants are incorporated on the principle of mutual insurance. The plaintiffs are mortgagees of the premises insured, and assignees of the policy. The assignment is under seal, and is approved by the secretary, according to the rules of the company. The original policy continued but for one year, having expired on the twenty-sixth of June, 1852. The declaration avers, that it was thrice subsequently renewed, according to the by-laws of the company; that the term of the first renewal expired on the twenty-fourth of June, 1853, and of the second renewal on the twenty-fourth of June, 1854; that it was renewed a third time, on the twenty-third of January, 1855, for the term of one year, and that within that year, viz., on the twenty-eighth day of February, 1855, the building insured was destroyed by fire; that the premium upon each of the renewals was paid by the assignees; that, by such assignment and continuance of the policy, the plaintiffs became members of the association, and, as such, liable for all losses that might accrue by reason of such insurance; and that, in consideration thereof, and of the plaintiffs undertaking to do and perform all things in the policy contained on the part of James Stewart (the party originally insured) to be done and performed, the defendants undertook and promised, and became insurers to the plaintiffs for one thousand dollars. The plaintiffs further aver, that at the time of the insurance, and at the time of the loss by fire, the plaintiffs were interested in the premises to the amount of one thousand dollars, being the full amount of insurance thereon, and that they

Crockett, 6 Yerg. (Tenn.) 330 (1834); Kirkman v. Hamilton, 6 Pet. 20, 8 L. Ed. 305 (1832). That it does not: Olive v. Napier, Cooke (Tenn.) 11 (1811: full discussion; overruled).

Bearer against maker. That it does: Carroll v. Meeks, 3 Port. (Ala.) 226 (1836).

Indorsee against his indorser (note). That it does: Brown v. Bussey, 7 Humph. (Tenn.) 573 (1847). That it does not: Frierson v. Reeves, 7 Humph. (Tenn.) 359 (1846: not noticed in case above).

Indorsee against remote indorser (note). That it does: Onondaga Bank v. Bates, 3 Hill (N. Y.) 53 (1842); Loose v. Loose, 36 Pa. 538 (1860).

Debt lies on a simple contract when by its performance a common-law debt has arisen. Duppa v. Gerrard, Comb. 163 (1689); City of Portland v. Railroad Co., 66 Me. 485 (1877); Furman v. Parke, 21 N. J. Law, 310 (1848); Baum v. Tonkin, 110 Pa. 569, 1 Atl. 535 (1885); Dillingham v. Skein, Fed. Cas. No. 3,912a (1832). The same is true of debt on a specialty. Sanders v. Marke, 3 Lev. 429 (1702); Knapp v. Hoboken, 38 N. J. Law, 371 (1876).

For the early history of Debt, see 8 Harv. Law Rev. 260 et seq.

[5] Statement of facts, parts of the opinion of the Chief Justice, and the concurring opinion of Potts, J., omitted.

sustained damage, by reason of the fire, to the amount of one thousand dollars.

To the declaration there is a demurrer.

The first ground of demurrer is, that the action cannot be brought in the name of the assignee of the policy.[6] * * * Assuming this to be the true interpretation of the contract, it is clear that the assignees may maintain an action in their own names. They sue, not upon the original policy under seal, but upon a new parol agreement made directly between the defendants and the plaintiffs.

But it is further objected that the action is misconceived, and that an action of debt cannot be maintained upon the contract set out in the plaintiffs' declaration. This objection raises two questions, viz. first, whether an action of debt will lie, in any case, upon a policy of insurance not under seal; second, whether debt can be sustained upon the policy which forms the subject of the present action.

The books very generally state the rule to be, that if the contract be not under seal, the remedy is assumpsit; if under seal, the remedy is debt or covenant. Ellis on Ins. 90; Angell on Ins. § 355; Annesley on Ins. 49; 1 Chit. Pl. (7th Ed.) 125, 132; 2 Ibid. 179, note q; 2 Saund. on Pl. & Ev. 592. And the precedents will be found to be in correspondence with this statement of the principle. 2 Chit. 178, 429, 536; 1 Went. 470; 3 Went. 386, 403, 410; 7 Went. 38. The cases of precedents in debt upon policies are very rare, and are principally, if not exclusively, confined to valued policies upon ships and cargo. I find no precedent of a declaration in debt upon a fire policy, and no precedent of a declaration in debt upon any policy not under seal.

The authorities cited in support of the principle, that an action of debt will lie upon a policy under seal, show that that form of action was authorized by Stat. 6, Geo. I, ch. 18, under which two companies were incorporated for the assurance of ships and merchandise at sea. Marsh. on Ins. 596

Although the books appear to confine the action of debt exclusively to policies under seal, it is not supposed that, in principle, that circumstance can affect the form of the remedy. If the nature of the demand be such as to sustain the action, it is immaterial whether the contract be by deed or by parol, express or implied. Provided the certainty of the sum appears, and the plaintiff is to recover the sum in numero, and not to be repaid in damages, the action of debt may be sustained irrespective of the form of the contract. Buller's N. P. 167; 1 Chit. Pl. 123, 124. Debt will lie against a corporation for the recovery of a debt or sum certain, in all cases where assumpsit will lie. 1 Chit. Pl. 125. The real question is, whether the claim of the plaintiff be for a sum certain, in the nature of a debt, or merely for damages for breach of contract.

[6] The Chief Justice here discussed the legal effect of the facts alleged.

Upon fire policies, the underwriters are not liable beyond the amount of damage actually sustained by the plaintiff. If the party insured disposes of his interest in the building prior to its destruction by fire, he is entitled to recover nothing upon the policy, though the loss be total, because he has sustained no damage. The underwriters are bound to make satisfaction to the party insured for the loss he has sustained. Their contract is not, that they will pay one thousand dollars if the house is destroyed by fire within the period of insurance, but that they will indemnify the insured against all loss which he may sustain by reason of the fire. Lynch v. Dalzell, 4 Brown's P. C. 432; The Sadler's Co. v. Badcock, 2 Atk. 554; Carpenter v. The Prov. Wash. Ins. Co., 16 Pet. 503, 10 L. Ed. 1044.

The strongest view that can be taken in favor of the action of debt, as an appropriate remedy, is that the contract is in the nature of a valued policy; that the house, having been insured for one thousand dollars, and the loss being total, the sum which the plaintiffs are to recover is ascertained by the parties. But even upon a valued policy, the amount specified is only prima facie evidence of the real value. It is open to the defendants to prove that, in point of fact, the articles insured were worth less than the value at which they were insured. Marsh. 201.

In case of a partial loss of the property, or the sale of part by the owner, where the insurance is in his favor, or a partial payment on a mortgage, when the insurance is effected by the mortgagee, it is clear that the value of the property cannot fix the measure of damages. They are in their nature unliquidated, and cannot, therefore, be recovered in action of debt.

In Long v. Long, 1 Hill (N. Y.) 597, it was held that an action of debt will not lie for the breach of a sealed contract to pay a note, and save the plaintiff harmless and indemnified therefrom, when the amount of the note does not appear in the contract. Bronson, J., in delivering the opinion of the court, said: "The agreement is special, and is in effect a covenant to indemnify and save harmless. The damages are unliquidated. It is true that debt will sometimes lie when the certainty of the sum has to be made out by averment; but not, I think, on a covenant of indemnity." That case is decisive against the plaintiffs' right to sue in debt in the present instance; but it goes much further than is necessary to sustain the defendants' objection.

Whatever doubt may exist upon this question as applied to the ordinary contract of insurance, I think there can be none in regard to the policy on which the present action is founded. Its terms are peculiar. After insuring one thousand dollars upon the building, the contract proceeds as follows: "But on condition of loss or damage by fire in or upon said building, the directors shall either compromise and agree with the insured for the amount of such loss or damage

sustained, and pay over to the assured the amount of such agreement, or otherwise they shall, with all convenient expedition, proceed to repair, rebuild, or replace such loss or damage as it was, or as near as may be of the same value as it was before such loss or damage occurred. This clearly is not a covenant to pay liquidated damages. The covenant is express, that the damages are either to be ascertained, or the building to be restored to its former condition. The breach is, that the defendants did neither. The strongest interpretation which can be given to the language of the contract, laying out of view its alternative character, is that the underwriters covenant to indemnify the assured for all damages or loss which they may sustain by reason or means of fire happening to the property insured, not exceeding the sum specified in the policy. If this be the true meaning of the contract, it is a mere contract of indemnity against unliquidated or unascertained damages, for which no action of debt can be maintained, whether the contract be by deed or by parol. The pleader has attempted, in his declaration, to meet this aspect of the contract, for he avers not only that the building was insured for one thousand dollars, and that it was destroyed, but he avers that, by reason of the fire, he sustained damage or loss to the value of one thousand dollars. That is a distinct material averment, and must be proved upon the trial. Ellis on Ins. 94.

The error in the form of the action is not assigned specially as a ground of demurrer. The objection, however, is not a matter of form, but of substance, and may be raised upon general demurrer, or may be taken advantage of in arrest of judgment, or upon writ of error. 1 Chit. Pl. 226.

The demurrer is allowed.[7]

POTTS, J. * * * I concur in allowing the demurrer.

ELMER and HAINES, JJ., concurred.

[7] On the question whether there was a sufficient "quid pro quo" here to maintain the action, see: Harris v. Bervoir, Cro. Jac. 687 (1825); Bedell v. Janney, 9 Ill. 193, 209 (1847) semble; Abe Lincoln Society v. Miller, 23 Ill. App. 341 (1887); Applegate v. Jacoby, 9 Dana (Ky.) 206 (1839); Ellicott v. Insurance Co., 8 Gill & J. (Md.) 166 (1836); Franklin Co. v. Massey, 33 Pa. 221 (1859); People's Co. v. Spencer, 53 Pa. 353, 91 Am. Dec. 217 (1867).

In accordance with the reasoning of the court are: Purslow v. Bailey, 2 Ld. Ray. 1040 (1705) semble; Nelson v. Ford, 5 Ohio, 473 (1832); Weiss v. Iron Co., 58 Pa. 295, 301 (1868). Contra are: Franklin Co. v. Massey, 33 Pa. 221 (1859); People's Co. v. Spencer, 53 Pa. 353, 359, 91 Am. Dec. 217 (1867). See also the cases cited under Crockett v. Moore, post, p. 358.

Cases adopting the same limitation on debt upon specialties are: Haynes v. Lucas, 50 Ill. 436 (1869); Fox Co. v. Reeves, 68 Ill. 403 (1873); Sinclair v. Piercy, 5 J. J. Marsh. (Ky.) 63 (1830); Mitchell v. McNabb, 58 Me. 506 (1870); Bell v. Curtis, 2 N. J. Law, 142 (1806); Morgan v. Guttenburg, 40 N. J. Law, 394 (1878); Long v. Long, 1 Hill (N. Y.) 597 (1841). Contra are: Seretto v. Railway, 101 Me. 140, 142, 147, 63 Atl. 651 (1906: misapplication of the rule accord); Kirk v. Hartman, 63 Pa. 97, 107 (1870: same as last).

Debt will not lie on a quasi contract or breach of legal duty, where the recovery will not be a sum certain. Bonafous v. Walker, 2 T. R. 126 (1787) semble; Dowell v. Boyd, 3 Smedes & M. (Miss.) 592, 605 (1844) semble; Lovell v. Bellows, 7 N. H. 375 (1835).

THOMPSON v. FRENCH.

(Supreme Court of Tennessee, 1837. 10 Yerg. 452.)

TURLEY, J., delivered the opinion of the court.

This is an action of debt brought by the defendant in error to recover compensation for services rendered the plaintiff's intestate in his life time, as a general superintendent of his property and business. The declaration contains the indebitatus count for work and labor done, and a count upon a quantum meruit for the same services. The pleas are nil debet, and the statute of limitations. The jury found a verdict for the defendant in error, upon which the court gave judgment, and to reverse which, this writ of error is prosecuted.

The proof shows abundantly, that Wm. P. French, the plaintiff in the circuit court, was assiduously engaged in attention to the business of Thomas Hopkins, the intestate, almost continually from the year 1821 to the year 1836, but without any special contract as to the amount or nature of the compensation to be given therefor, and out of this, the first cause of error is assigned, viz. that the action of debt is not the proper remedy, because 1st. the damages being unliquidated and uncertain, the proper remedy is assumpsit and not debt, and 2d. the action is not maintainable against an administrator upon the simple contract of his intestate by the principles of the common law.[8]

That the actions of debt and indebitatus assumpsit are concurrent remedies in cases of simple contracts for the payment of money, either express or implied, has been so repeatedly held, that it is deemed unnecessary to enter into an examination of the authorities in support of the proposition, and we are satisfied with a reference to the case of Hickman v. Searcy's Ex'r, 9 Yerg. 47, where this point is expressly so adjudicated by this court.

That indebitatus assumpsit is a proper remedy to recover compensation for work and labor done, cannot be denied—indeed, (if the action of debt be not proper,) it is the only remedy, where the amount of compensation has not been ascertained by express agreement, for no special count in assumpsit can be framed upon a promise arising by implication of law. The special counts in assumpsit are given to recover damages for the non-performance of contracts specially entered into, and whether the consideration be executed or executory, makes no difference. The common counts are founded on express or implied promises to pay money in consideration of a precedent and existing debt, and in general, the consideration must have been executed, not executory, and the plaintiff must have been entitled to payment in money. 1 Chitty's Pl. 373. So that the indebitatus count in assumpsit is no more the proper remedy to recover unliquidated damages arising from the non-performance of a special contract, than

[8] The discussion of this point by the court is omitted.

would be the action of debt. But it is said that the action of debt will only lie for a sum which is certain, or is capable of being readily reduced to a certainty. This as a general principle is true, but extended to the length to which it is sought to be carried, would be entirely subversive of the action of debt as a remedy upon simple contracts, where the amount to be paid has not been ascertained by express agreement, or would make the right to use it depend not upon legal principles, but upon the nature and character of the proof to be adduced upon the trial, and the ease or difficulty with which the value of services performed or the goods delivered, could be ascertained thereby. It is not denied that the action will lie for goods, wares and merchandise sold and delivered, and for work and labor done, although there be no express agreement as to the amount to be paid. This court cannot therefore say that the test is the difficulty of ascertaining the value of the goods sold and delivered, and the work and labor done, because they may be of a kind and character about which men may well differ in opinion.

It is not to be denied, that there is some confusion produced in the books relative to the use of this action, by the employment of such terms as "eo nomine," "in numero," and "unliquidated damages." But it is well settled, that although a specific sum must be demanded in the declaration, a less may be recovered, and that although in all cases of goods, wares and merchandise, sold and delivered, and of work and labor done, where the law implies the promise, because the consideration is executed, the damages are of necessity unliquidated, yet the action is maintainable. But this confusion is produced either by a loose use of the phrases, or by giving them an improper construction. By "eo nomine," and "in numero," is only meant, that a specific sum is sought to be recovered which is improperly detained, and that the action does not sound in damages as does the action of assumpsit, thus drawing the proper line of demarcation between them, as applicable to contracts of the character under consideration. By the words, "unliquidated damages," is manifestly meant (if there be any meaning in what is most unquestionably a very loose use of words,) such damages as are sustained by the non-performance of an executory contract, which cannot be considered as a money demand, and the amount of which may depend upon such a variety of considerations and circumstances, as to render it exceedingly difficult to be ascertained. To illustrate it by an example, suppose a contract for the building of a house, which is not performed, or performed in a manner different from the contract, the damages sustained are "unliquidated," and such as are not readily reduced to a certainty, and for which neither indebitatus assumpsit nor debt will lie.

The principle then established by us is this, "that in all cases where the consideration has been executed and where there is an express or implied promise to pay in money the value thereof, indebitatus as-

sumpsit or debt is the proper remedy. But that in all those cases, where the consideration is not executed, or if it be, and the promise to be performed in consideration thereof, is not to pay money, but to do some other thing, that neither indebitatus assumpsit or debt will lie, and that the remedy is by a special action on the case. * * *

Upon the whole, we think there is no error in the rendition of the judgment in the court below, and direct its affirmance.

Judgment affirmed.[9]

CROCKETT v. MOORE.

(Supreme Court of Tennessee, 1855. 3 Sneed, 145.)

CARUTHERS, J., delivered the opinion of the Court.[10]

This was an action of debt brought upon an instrument executed by the defendant to the intestate of the plaintiff in these words:

"Due James Hunter, eight hundred dollars, payable in good bar iron, at 6¼ cents a pound, it being for value received of him, this 24th day of April, 1841. Witness my hand seal.

"Robert Crockett. [Seal.]"

Verdict and judgment in favor of the plaintiff, for the balance unpaid of the $800, and interest. Motions for a new trial, and in arrest of judgment, overruled, and appeal in error to this Court.

Several questions have been made and argued for a reversal.

1. It is contended that debt is not the proper action, but that it should have been covenant. Much vexation and perplexity have existed in the Courts here and elsewhere in relation to the right form of action in cases of this kind. While it is yet considered proper by the well-informed and experienced, to have regard to the distinctions in the forms of action in the pursuit of rights, yet much of the technicality, and refinement of former times have been wisely abolished by the Legislature and the Courts. The former, in 1852, ch. 152, enacts, in sec. 4, "That all motions in arrest of judgment for matters of form

[9] Jenkins v. Richardson, 6 J. J. Marsh. (Ky.) 441, 22 Am. Dec. 82 (1831); Norris v. Windsor, 12 Me. 293, 28 Am. Dec. 182 (1835); Seretto v. Rockland S. T. & O. H. Ry., 101 Me. 140, 63 Atl. 651 (1906); Smith v. Lowell, 8 Pick. (Mass.) 178 (1829); Van Deusen v. Blum, 18 Pick. (Mass.) 229, 29 Am. Dec. 582 (1836). Accord. Young v. Ashburnham, 3 Leon. 161 (1587). Contra.

If the sum is capable of ascertainment, that is sufficient. Walker v. Witter, 1 Doug. 1 (1778); Mahaffey v. Petty, 1 Ga. 261 (1846); Belford v. Woodward, 158 Ill. 122, 136, 41 N. E. 1097, 29 L. R. A. 593 (1895) semble.

So of debt on a specialty. Wetumpka Co. v. Hill, 7 Ala. 772 (1845). But contra: Hale v. Hall, 2 Brev. (S. C.) 316 (1809).

But the rule does not apply to debt on quasi contracts, according to: District v. Railroad, 1 Mackey (D. C.) 361, 382 (1882); Dowell v. Boyd, 3 Smedes & M. (Miss.) 592, 605 (1844).

That one can recover quantum meruit in indebitatus assumpsit has seldom been doubted. Note Parker v. Macomber, ante, p. 318.

[10] Part of the opinion omitted.

in any of said civil suits are hereby abolished." Sec. 7, "That hereafter it shall not be lawful for the Supreme Court of Tennessee to dismiss any suit for matters of form, * * * except when a demurrer has been filed in the Court below, * * * and no judgment shall be reversed for any defect or imperfection in matters of form which might by law have been amended." Pamp. Acts, 219. What is to be regarded as matter of form, and what of substance, in pleading, is not very clearly defined. But we cannot doubt, that the distinction between the actions, debt and covenant, on a contract like this, under the spirit of that act, should be considered mere matter of form. There was no demurrer filed in this case, and consequently it is too late now, if the objection exists, to make it available.

But we think the action was well brought according to our decided cases. There certainly is some appearance of conflict in the cases, which it would be useless now to attempt to reconcile. We understand the true rule in relation to these property contracts, to be, that when the contract, upon its face, or in its terms, furnishes the means of ascertaining the exact amount due for specific articles or services, debt will lie. Langtry v. Walker & Polk, 6 Humph. 336; Marrigan v. Page, 4 Humph. 247; 1 Meigs' Dig. p. 413. If the contract before us be tested by this rule there can be no difficulty. The obligation is for $800, payable in bar iron at 6¼ cts. per pound. There is no uncertainty here; the quantity of iron is 1,280 pounds, and its value is fixed by contract—it can neither be more nor less—there is nothing to test by proof; no room for the exercise of discretion in the assessment of damages. It would be different if the contract were for 1,280 pounds of iron. Then the recovery would be in damages to be ascertained by a jury upon proof of its value on the day due. So, if the contract were for a horse, so much wheat, corn or pork, the recovery would be in damages, or as it is sometimes expressed, "sound in damages;" in such cases debt will not lie. But in all these cases, if the price of the article be fixed in the contract, or if the contract be for a sum certain "to be paid," or "which may be paid," or "payable" in any kind of property, debt may be brought, because the sum to be recovered is certainly fixed by the parties to the contract, for a failure to pay the property, and there is no room for the assessment of damages. If a jury were to find less, or more, the court would set aside the verdict. The numerous cases maintaining this position are referred to and digested in 1 Meigs' Dig. p. 413. Upon first principles, as laid down in the elementary books, the proposition is equally clear. 3 Bl. Com. 154; 1 Chitty, 100; 2 Ba. Ab. 279. The principle is, that where the amount to be recovered is specific and fixed, and does not depend upon any valuation, or assessment to fix it, debt may be brought. But where a contract for specific articles or performance of services does not specify the value in money of such articles or services, but the same has to be ascertained by a resort to extraneous

evidence by the tribunal before which suit is brought, the action cannot be debt.[11] * * *

Finding no error in the judgment, we affirm it.

RUDDER v. PRICE.

(Court of Common Pleas, 1791. 1 H. Bl. 547.)

This was an action of debt on a promissory note payable by instalments, brought in a former term by the payee against an attorney the maker, by bill of privilege. The first count, on which the question before the Court arose, after stating the debt to be £452. 10s. which the defendant owed to and unjustly detained from the plaintiff, went on "For that whereas the said Stephen on the 30th day of March in the year of our Lord 1790, to wit, at Westminster in the county aforesaid, made his certain note in writing, commonly called a promissory note, his own proper hand and name being thereto subscribed, bearing date the day and year aforesaid, and then and there delivered the said note to the said Richard, by which said note the said Stephen promised

[11] Eastland v. Sparks, 22 Ala. 607 (1853: indebitatus assumpsit) semble; Nelson v. Ford, 5 Ohio 473 (1832: debt on simple contract); Bollinger v. Thurston, 2 Mill. Const. (S. C.) 447 (1818: debt on specialty); Kent v. Bowker, 38 Vt. 148 (1865: indebitatus assumpsit). Accord. Nesbitt v. Ware, 30 Ala. 68, 74 (1857: debt on specialty). Contra.

If defendant promises to pay in money, or goods at payee's option, debt lies. Henry v. Gamble, Minor (Ala.) 15 (1820: debt on simple contract).

If defendant promises to pay in money, or goods at defendant's option, debt lies. Forsyth v. Jervis, 1 Stark. 437 (1816: indebitatus assumpsit); Bradford v. Stewart, Minor (Ala.) 44 (1821: debt on specialty); Gregory v. Bewly, 5 Ark. 318 (1844: debt on specialty); Russell v. Branham, 8 Blackf. (Ind.) 277 (1846: indebitatus assumpsit); Baylies v. Fettyplace, 7 Mass. 325, 329 (1811: indebitatus assumpsit) semble; Edwards v. McKee, 1 Mo. 123, 13 Am. Dec. 474 (1821: debt on simple contract); Young v. Hawkins, 4 Yerg. (Tenn.) 171 (1833: debt on specialty); Wainwright v. Straw, 15 Vt. 215, 40 Am. Dec. 675 (1843: indebitatus assumpsit); Butcher v. Carlile, 12 Grat. (Va.) 520 (1855: debt on specialty); Minnick v. Williams, 77 Va. 758 (1883: debt on specialty). Accord. Thomas Co. v. Watson, 85 Me. 300, 27 Atl. 176 (1893: indebitatus assumpsit). Contra.

On a promise to pay a definite sum in goods, debt lies. Anonymous, 1 Anderson, 117, pl. 165 (1584: debt on specialty); McKinnie v. Lane, 230 Ill. 544, 82 N. E. 878, 120 Am. St. Rep. 338 (1907: indebitatus assumpsit); Barrett v. Twombly, 23 Me. 333 (1843: debt on specialty); Bloomfield v. Hancock, 1 Yerg. (Tenn.) 101 (1826: debt on simple contract); Randall v. Jacques, Fed. Cas. No. 11,553 (1857: debt on simple contract). Accord. Mattox v. Craig, 2 Bibb (Ky.) 584 (1812: debt on simple contract); Cassady v. Laughlin, 3 Blackf. (Ind.) 134 (1832: debt on specialty). Contra.

On a promise to pay a definite sum in some form of currency, not legal tender, debt does not lie. Young v. Scott, 5 Ala. 475 (1843: debt on specialty); Hudspeth v. Gray, 5 Ark. 157 (1843: debt on simple contract); Sinclair v. Piercy, 5 J. J. Marsh. (Ky.) 63 (1830: debt on specialty); Mix v. Nettleton, 29 Ill. 245 (1862: debt on simple contract); Harper v. Levy, 1 Blackf. (Ind.) 294 (1824: debt on specialty); Scott v. Conover, 6 N. J. Law, 222 (1822: debt on specialty); Deberry v. Darnell, 5 Yerg. (Tenn.) 451 (1830: debt on specialty); Dungan v. Henderlite, 21 Grat. (Va.) 149 (1871: debt on specialty).

to pay to the said Richard by the name of Mr. Richard Rudder or order, fifty-two pounds ten shillings for value received by him the said Stephen, the same to be paid in manner following, (that is to say,) twenty pounds on the first day of July then next, twenty pounds on the first day of October then next, and twelve pounds ten shillings on the first day of January next, by reason whereof and by force of the statute in such case made and provided, the said Stephen became liable to pay to the said Richard the said sum of money in the said note specified, according to the tenor and effect of the said note, whereby an action hath accrued to the said Richard to demand and have of and from the said Stephen the said sum of money in the said note mentioned, parcel of the said sum of four hundred and fifty-two pounds ten shillings above demanded, &c." There were also the common money counts for the residue of the sum of £452. 10s. above demanded.

Special demurrer to the first count, the causes of which were, "That in and by the said first count of the said declaration it appears that the said sum of £52. 10s. in the said notes mentioned is not yet due or payable, nor can the same be sued for by the said Richard Rudder till after the first day of January in the year of our Lord 1791, and also for that no cause of action whatsoever is in the said first count of the said declaration stated or alleged against the said Stephen, &c." To the other counts the defendant pleaded nil debet, on which issue was joined.

LORD LOUGHBOROUGH.[12] I take it, that at the time when Slade's Case, 4 Coke, 94, was decided, an action of debt could not be brought on a debt due by instalments, till all the days of payment were past. * * * The idea that an action of debt could not be brought till all the days of payment were past, was founded on a good ground of law, that for one contract there should be but one action; and as a contract to pay a certain sum on several days of payment was considered as one contract, it followed that no action could be brought till all the days of payment were elapsed. The construction perhaps has been too literal, for between a contract to pay five sums of £20. on five different days,[13] and a contract to pay £100. by five sums of £20. on different days, the distinction is merely verbal and consists in form: the substantial meaning is the same in each. This construction however has long prevailed. The objection indeed is only to the construction, not to the rule of law which is evidently a just one if the contract be really entire, as to do a series of acts under a certain

[12] Part of the opinion omitted.

[13] Debt will lie for each sum here. De Tuyl v. McDonald, 8 U. C. Q. B. 171 (1850). So if the promise is single but to pay five different sums which are really not parts of a single gross sum. Foord's Case, 5 Co. 81a (1595) semble; Pilton v. Darby, Comb. 57 (1605); Marsh v. Freeman, 3 Lev. 383 (1694); Hoy v. Hoy, 44 Ill. 469 (1867). So of debt on a record. Stanfield v. Fetters, 7 Blackf. (Ind.) 558 (1845).

penalty. * * * Slade's Case appears to me to be the first where general damages for the non-performance of a contract were laid as the cause of action. But not long after, the action of assumpsit was brought, following the course in which the Court had supported the action in Slade's Case, and declaring generally without stating any special damage. The plaintiff was permitted to recover in assumpsit, yet he was obliged to demand the whole damages for the whole contract: and it seems to have been clearly understood by Lord Coke when he was reporting Slade's Case that this was the law with respect to the action of assumpsit, for he states in the fourth resolution in that case that a recovery in assumpsit would be a bar to an action of debt on the same contract; the necessary result of which is, that in an action of assumpsit brought after the first default the plaintiff was obliged to go for damages for non-performance of the whole contract. Accordingly in Beckwith v. Nott, Cro. Jac. 504, the action was brought on a promise to pay four pounds by five shillings a month, and after a default of four months the whole four pounds were given to the plaintiff in damages. In reading the report of that case, the singularity of permitting the plaintiff to recover the whole sum, when only four months were in arrear, is very striking; but the Court held that the jury had a right to give, if they thought fit, the whole damages for the non-performance of the contract: and the Reporter adds as a note of his own, "that where a man brings such an action for breach of an assumpsit upon the first day, it is best to count of damages for the entire debt, for he cannot have a new action." So in a case in 9 Car. I, Peck v. Ambler, in the margin of Dyer, 113, Berkley held, that if an action of assumpsit be brought on the first default, the plaintiff should recover damages for the whole time, and should never have another action for another default; for the contract was determined, et transit in rem judicatam by the first action. This seems to have been understood to be the law till the case of Cooke v. Whorwood, 2 Saund. 164, where the Court determined, that in assumpsit to perform an award, whereby the defendant was awarded to pay the plaintiff several sums of money at several times, the action might be brought for such sum only as was due at the time when the action was brought, and that the plaintiff should recover damages accordingly, and have a new action as the other sums became due, toties quoties. Antecedent to that time, the distinction between an action of assumpsit and an action of debt with regard to money payable by instalments, rested on this, that the action of debt would not lie at all, till after the expiration of all the times of payment, but the action of assumpsit might be brought on the first default; but then that one action exhausted the whole contract, and the plaintiff was to recover damages for the whole, as he could not have a fresh action. * * *

In the older cases, it is admitted, that an action of debt could not be brought for the payment of money due by installments till all the days were passed: the meaning of this was that no action would lie.

The inconvenience of this rule put the judges upon a method of getting rid of the supposed difficulty, by having recourse to the action of assumpsit, which, where the assumpsit proceeds in demand of money, is in truth and substance, and so taken to be in some of the cases, a more special action of debt; for where the demand is for the payment of a sum of money, it is a technical fiction to call the sum recovered damages; it is the specific debt, and the jury gave the specific thing demanded. * * * I cannot indeed devise a substantial reason why a promise to pay money not performed, does not become a debt, and why it should not be recoverable, eo nomine, as a debt. But the authorities are too strong to be resisted. Though the law has been altered with respect to actions of assumpsit, no alteration has taken place as to actions of debt. The note in question is for the payment of a sum certain at different times, must be considered as a debt for the amount of that sum, and being so considered, no action of debt can be maintained upon it till all the days of payment be past.

Judgment for the defendant.[14]

Afterwards the plaintiff had leave to amend.

DYER v. CLEAVELAND.

(Supreme Court of Vermont, 1846. 18 Vt. 241.)

Debt on jail bond. The plaintiff averred in his declaration, that at the April Term, 1842, of Rutland county court he recovered judgment against the defendant Cleaveland for a sum in damages and costs; that afterwards, on the sixth day of October, 1842, he took out an execution, in due form of law, upon his judgment, and delivered it to the sheriff to levy, serve and return according to law; that on the

[14] Blakemore v. Wood, 3 Sneed (Tenn.) 470 (1856). Accord. So of debt on a specialty. Forsyth v. Johnson, 6 U. C. Q. B. (O. S.) 97 (1840); Lyall v. City, 8 U. C. C. P. 365 (1858); Farnham v. Hay, 3 Blackf. (Ind.) 167 (1833) semble; Fontaine v. Aresta, Fed. Cas, No. 4,905 (1840); Peyton v. Harman, 22 Grat. (Va.) 643 (1872).

When all the installments are due, debt will lie. Anonymous, 3 Leon. 119 (1585); Inglish v. Watkins, 4 Ark. 199 (1842); Brown v. Brown, 10 B. Mon. (Ky.) 247 (1850) semble.

Debt will lie for the penalty of a bond, if the condition is broken by the nonpayment of one installment. Coates v. Hewit, 1 Wilson, 80 (1744); Forsyth v. Johnson, 6 U. C. Q. B. (O. S.) 97 (1840) semble; Sparks v. Garrigues, 1 Bin. (Pa.) 152 (1806); Fontaine v. Aresta, Fed. Cas. No. 4,905 (1840) semble.

Indebitatus assumpsit will lie for each installment separately. Gray v. Pindar, 2 B. & P. 427 (1801).

There are other instances where indebitatus assumpsit will lie, though debt will not. See Evelyn v. Chichester, 3 Burr. 1717 (1765); 1 Chitty, Pleading (13th Am. Ed.) p. 113. They depend on the rights of peculiar parties and are beyond our purview. Debt on simple contract may lie, where indebitatus assumpsit will not. See 1 Chitty, Pleading (13th Am. Ed.) p. 105. This depends on notions concerning the nature of rent and the higher character of debt as a remedy.

fifth day of December, 1842, the sheriff, for want of goods and estate of Cleaveland, whereof to levy the debt, arrested his body and committed him to the jail in the county of Rutland, within the prison, until he should pay and satisfy to the plaintiff his damages and costs aforesaid, as by the said writ the sheriff was commanded; that Cleaveland was admitted to the liberties of the prison the same day, and thereupon the defendants executed a bond, with a condition specifying that Cleaveland was a prisoner for the sum of damages and costs specified in the execution, and also for the officer's fees of commitment, and that he should not depart from the liberties of the prison, unless lawfully discharged. And the plaintiff alleged, that Cleaveland, without right, departed from the liberties of the prison on the second day of October, 1843; and a proper assignment of the jail bond to the plaintiff was averred.

The defendants pleaded nil debet, and also a plea in bankruptcy. * * *

The county court,—Williams, Ch. J., presiding,—adjudged the pleas insufficient; to which decision the defendants excepted.

The opinion of the court was delivered by

BENNETT, J.[15] The first question presented for our consideration is, whether, in an action of debt upon a jail bond, nil debet is a good plea. When the plaintiff counts upon a deed only as inducement to the action, nil debet is a good plea. In an action of debt for rent, due on a deed of lease, the deed is but inducement. The subsequent occupation by the defendant under the demise is the gist of the action. Rent is considered as a profit, which issues out of the land, and when sued for as a debt, it is considered, that the debt arises out of the receipt of the issues and profits by the defendant; and not from the deed. The declaration, in fact, alleges the debt, as arising from the occupation of the premises; and the lease is mere matter of evidence. In such case it is quite clear, that nil debet is a good plea. 1 Saund. 276, n. 1.[16] It is equally well settled, that, wherever the action is founded on a deed, the deed must be declared upon; and in such case the plea of nil debet is ill on general demurrer. 2 Wil. 10; 1 Chit. Pl. 478; 1 Saund. 38, n. 3; Warren v. Consett, 2 Ld. Raym. 1500. If the plea of nil debet were sufficient, it would, in practice, be quite inconvenient and expensive for the plaintiff. It would be necessary for him to come prepared to prove not only the execution of the bond, but also all those facts, which are necessary to give him a right of action. The defendant would also be allowed to avail himself of every special matter of defence,

[15] Parts of the statement of facts and of the opinion omitted.

[16] Wilson v. ———, Hardres, 332 (1663) semble; Warren v. Consett, 2 Ld. Raym. 1500 (1727) semble; Miller v. Blow, 68 Ill. 304, 310 (1873); Garvey v. Dobyns, 8 Mo. 213 (1843); Gates v. Wheeler, 2 Hill (N. Y.) 232 (1842) semble; Davis v. Shoemaker, 1 Rawle (Pa.) 135 (1829). Accord. Tyndal v. Hutchinson, 3 Lev. 170 (1684). Contra.

which he might have proved, under the same plea, in an action of debt on simple contract.

The present action is founded upon the bond; though it was necessary for the plaintiff to state in his declaration other facts, to entitle himself to a recovery. The plaintiff could not declare for the escape and give the bond in evidence, but must declare upon the bond itself. Atty. et al. v. Parish et. al., 4 B. & P. 104. In Smith v. Whitehead, cited in Warren v. Consett, 2 Ld. Raym. 1503, it was expressly held, that, in an action of debt, brought by the assignee of the sheriff upon a bail bond, nil debet was not a good plea. That case was held to be a sufficient authority to govern the case of Warren v. Consett. In debt for an escape, the escape is the foundation of the action, and the judgment is merely inducement; and for this reason it has always been held, that in such action nil debet is a good plea.[17] The defendant's first plea must, then, be held insufficient. * * *

The result is, the judgment of the county court is affirmed.[18]

WALKER v. WITTER.

(Court of King's Bench, 1778. 1 Doug. 1.)

This was an action of debt brought in the county of Middlesex, on a judgment in the supreme court in Jamaica.—The first count of the declaration was in the following words: "William Witter, late of the parish of St. Mary le Bone, in the county of Middlesex, Esq. was summoned to answer Isaac Walker, Francis Newton, and John Colvill, assignees of the estate and effects of Samuel Bean, a bankrupt, within the true intent and meaning of the statutes made and provided, and now in force, concerning bankrupts, and Colin Mackenzie, Thomas Belt, and Alexander Grant, assignees of the estate and effects of Lewis

[17] Waites v. Briggs, 2 Salk. 565 (1695); Gates v. Wheeler, 2 Hill (N. Y.) 232 (1842) semble. Accord.

[18] Allen v. Smith, 12 N. J. Law, 159 (1831). Accord. State v. Leeds, 31 N. J. Law, 185 (1865: no mention of last case) semble; Minton v. Woodworth, 11 Johns. (N. Y.) 474 (1814). Contra.

Generally debt on simple contract will not lie on a specialty. Warren v. Consett, 2 Ld. Raym. 1500 (1727); Atty. Gen. v. Parish, 1 New R. 104 (1804); Middleditch v. Ellis, 2 Ex. 623 (1848); Hall v. Morley, 8 U. C. Q. B. 584 (1852) semble; Farnham v. Hay, 3 Blackf. (Ind.) 167 (1833) semble; Brents v. Sthal, 3 Bibb (Ky.) 482 (1814). Accord. Matthews v. Redwine, 23 Miss. 233 (1851: semble accord). Contra.

Debt on simple contract will not lie on an administrator's bond for a devastavit. Griffith v. Commonwealth, 1 Dana (Ky.) 270 (1833). Accord. Warren v. Consett, 2 Ld. Raym. 1500 (1727) semble; Gates v. Wheeler, 2 Hill (N. Y.) 232 (1842) semble. Contra.

It was held in Tilson v. Company, 4 B. & C. 962 (1825), that a common count in debt might be used though suit be on a specialty. See, also, Maddox v. Brown, 9 Port. (Ala.) 118 (1839).

Debt on a specialty will not lie on a simple contract claim. Smith v. College, 110 Md. 441, 72 Atl. 1107 (1909); Kidd v. Beckley, 64 W. Va. 80, 60 S. E. 1089 (1908).

Cuthbert, a bankrupt, &c. that he render to them £594. 0s. 4d. of lawful money of Great Britain, which he owes to, and unjustly detains from, them.—For that whereas the said Samuel, Lewis, and also one David Bean, since deceased, in the lifetime of the said David, and which said David, afterwards, and before the said Samuel and Lewis became bankrupt, died, and the said Samuel and Lewis survived him; that is to say, at Westminster in the county of Middlesex, heretofore, to wit, on the last Tuesday in May, in the sixth year of the reign of our sovereign lord the now king, and in the year 1766, in a certain court of record of our said lord the king, called the supreme court of judicature held for our said lord the king, at the town of St. Jago de la Vega, in the county of Middlesex, in and for the island of Jamaica, and within the jurisdiction of the said court, on the said last Tuesday of May, in the said sixth year of our said lord the now king, and in the year 1766, before the Honorable Thomas Beach, Esq., chief judge of the said court, and his associates then sitting judges of the same court, by the consideration and judgment of the same court, recovered against the said William a certain debt of £220. current money of the said island of Jamaica, and also £1. 16s. 3d. for their costs and charges by them, about their suit, in that behalf expended, to the said Samuel, Lewis, and David Bean, in the life-time of the said David, by the said court, of their assent adjudged, whereof the said William is convicted, as by the record and proceedings thereof remaining in the said court at the town of St. Jago de la Vega more fully appears; which said judgment still remains in that court in full force, unreversed, unpaid, and unsatisfied; that is to say, at Westminster in the said county of Middlesex; and that neither the said Samuel, Lewis, and David, or either of them, in the life-time of the said David, nor the said Samuel and Lewis, or either of them, since his decease nor the said Isaac, Francis, John, Colin, Thomas, and Alexander, as assignees as aforesaid, or either of them, have yet obtained execution of the aforesaid judgment, and the said Isaac, Francis, John, Colin, Thomas, and Alexander, in fact say, that the debt, costs, and charges aforesaid, so recovered as aforesaid, amount to a large sum of money, to wit, to the sum of £158. 8s. 2d. of like lawful money of Great Britain, that is to say, at Westminster aforesaid, in the said county of Middlesex, whereby an action hath accrued to the said Isaac, Francis, John, Colin, Thomas, and Alexander, as assignees as aforesaid, to demand and have of and from the said William, the said sum of £158. 8s. 2d. of lawful money of Great Britain, parcel of the sum of £594. 0s. 4d. above demanded."—Then there was a second count in the same form, stating a like judgment of the court in Jamaica for £608., and £1. 16s. 3d. costs, of Jamaica currency, or £435. 11s. 7d. sterling, being the residue of the sum of £594. 0s. 4d. demanded in the action.—The defendant, besides nil debet, pleaded also to the first count, "That there is not any such record of the recovery of the said debt, costs, and charges, in the said first count of

the said declaration mentioned against him the said William, in the said court of record of our said lord the king, called the supreme court of judicature held for our said lord the king at the said town of St. Jago de la Vega, in the said county of Middlesex, in and for the said island of Jamaica, and within the jurisdiction of the said court, before the Honorable Thomas Beach, Esq. chief judge of the said court, and his associates, then sitting judges of the same court as the said plaintiffs have, in the said first count of their said declaration, alleged, and this he is ready to verify, wherefore, &c."—There was a similar plea to the second count.—Upon the nil debet, the plaintiffs took issue and the trial coming on at the sittings in Westminster Hall, after Easter Term, 1778, a verdict was found for the plaintiffs.—To the pleas of nul tiel record, the plaintiffs replied, that there was such record, &c. (in the words of the pleas) "and this they the said plaintiffs are ready to verify by the said record; and thereupon a day is given to the said plaintiffs on, &c. to come before our said lord the king wherever, &c. to produce the said record, and the same day is given to the said defendant."

In Trinity Term, 18 Geo. 3, these issues in law came on to be argued; the judgment on which the action was brought having been brought into court, under the seal of the court of Jamaica.

The Solicitor-General (Wallace,) and Dunning, for the plaintiffs; Graham, Bower, and S. Heywood, for the defendant.—The case stood over till this day, when it was again argued by the same counsel.

For the defendant, several grounds were taken. It was contended, that an action of debt could not be maintained on a judgment in a foreign court; or, that, if debt would lie, yet it could not be maintained as on a specialty, but that the consideration of the judgment ought to be shewn in the declaration. That, if this judgment were to be considered as a specialty, the court had no jurisdiction, because actions on judgments are local, and must be tried in the county where the judgment is given.—These objections, if successful, would have entitled the defendant to an arrest of judgment on the verdict found for the plaintiffs on the nil debet.—On the issues joined on the nul tiel record, it was insisted, that there must be judgment for the defendant, because the judgment in Jamaica was not a record, in the proper legal sense of the word.

For the plaintiffs, it was said, that it is an established maxim, that, where indebitatus assumpsit will lie, debt will also lie; and that this court had determined, in the case of Crawford v. Whittal,[19] that indebitatus assumpsit may be maintained on a foreign judgment. That it was also determined, in that case, that the judgment is, of itself, prima facie evidence of the debt, and, therefore, the plaintiff is not bound to shew any other consideration. That in Sinclair v. Fraser, which was an appeal from the court of session in Scotland to the house

[19] Reported only in a note to the main case.

of lords, in the case of an action brought in that court on a judgment in Jamaica, it was laid down, as a general principle, that such a judgment is prima facie evidence of a debt, though it is competent to the defendant to impeach the justice of the judgment, by shewing it to have been irregularly, or unduly, obtained. That the plea of nul tiel record was absurd, and that the judgment ought to be the same as if there had been no such plea.

Upon this, and the former occasion were cited (among other authorities) besides Crawford v. Whittal, and Sinclair v. Fraser, the cases of Olive v. Gwin, Hard. 118, Otway v. Ramsey, 2 Str. 1090, and Campbell v. Hall, Cowper, 204.

Lord MANSFIELD, now and on the former occasion, said, that the plea of nul tiel record was improper.[20] Though the plaintiffs had called the judgment, a record, yet by the additional words in the declaration, it was clear they did not mean that sort of record to which implicit faith is given by the courts of Westminster Hall. They had not misled the court, nor the defendant, for they spoke of it as a record of a court in Jamaica. The question was brought to a narrow point, for it was admitted, on the part of the defendant, that indebitatus assumpsit would have lain, and on the part of the plaintiffs, that the judgment was only prima facie evidence of the debt. That being so, the judgment was not a specialty, but the debt only a simple-contract debt; for assumpsit will not lie on a specialty. The difficulty in the case had arisen from not fixing accurately what a court of record is in the eye of the law. That description is confined properly to certain courts in England, and their judgments cannot be controverted. Foreign courts, and courts in England not of record, have not that privilege, nor the courts in Wales, &c. but the doctrine in the case of Sinclair v. Fraser, was unquestionable. Foreign judgments are a ground of action every where, but they are examinable. He recollected a case of a decree on the chancery side in one of the courts of great sessions in Wales, from which there was an appeal to the house of lords, and the decree affirmed there; afterwards, a bill was filed in the court of chancery, on the foundation of the decree so affirmed, and Lord Hardwicke thought himself entitled to examine into the justice of the decision of the house of lords, because the original decree was in the court of Wales, whose decisions were clearly liable to be examined. (He also mentioned a case on the mortmain acts to the same purpose.)—Debt may be brought for a sum capable of being ascertained, though not ascertained at the time of the action brought. —(It had been said at the bar, that the value of Jamaica currency was fluctuating and uncertain.)—It is not necessary that the plaintiff in debt, should recover the exact sum demanded.

WILLES, Justice, of the same opinion.

[20] Dupleix v. De Roven, 2 Vern. 540 (1705) semble; Otway v. Ramsey, 2 Str. 1090 (1736). Accord. Hazzard v. Nottingham, Tappan (Ohio) 146 (1817) semble. Contra.

ASHHURST, Justice, of the same opinion.—He said, that, in indebitatus assumpsit on a foreign judgment, the judgment is shewn as a consideration; and, wherever indebitatus assumpsit can be maintained, debt will lie.

BULLER, Justice, of the same opinion.—He observed, that all the old cases shew, that, whenever indebitatus assumpsit is maintainable, debt also is. Till Slade's case, a notion prevailed, that, on a simple contract for a sum certain, the action must be debt: but it was held in that case, that the plaintiff had his election either to bring assumpsit, or debt. By the arguments in Vaughan, it seems the doctrine of Slade's case was not approved of at first, and from the manner in which the statute of 3 Jac. I, c. 8, is penned, it is probable the action of assumpsit was not then much in use in such cases. Afterwards, however, it became very general, and that is the reason why we meet with no instances in the books, of debt brought on foreign judgments. As to the point that the judgment is not a record, and that the defendant must have judgment on the pleas of nul tiel record, there is no foundation for it, because it is stated to be a judgment of a court in Jamaica. As such it is to be tried by the country, (as it might have been in this case, on the nil debet,) and not by the court. The prout patet per recordum in the declaration, is absurd and may be rejected, and the plea of nul tiel record is a mere nullity. The plaintiffs have done right to state the judgment in the manner they have done, because that is matter of description.

Judgment for the plaintiffs.[21]

[21] So assumpsit will lie on a foreign judgment. Harris v. Saunders, 4 B. & C. 411 (1825); Russell v. Smyth, 9 M. & W. 810 (1842); McFarlane v. Derbishire, 8 U. C. Q. B. 12 (1851); Buttrick v. Allen, 8 Mass. 273, 5 Am. Dec. 105 (1811: apparently indebitatus assumpsit).

Debt on record will lie on a domestic judgment. Anonymous, 1 Salk. 209 (1713); Denison v. Williams, 4 Conn. 402 (1822); Greathouse v. Smith, 3 Scam. (Ill.) 541 (1842); Rice v. Barre Turnpike Corp., 4 Pick. (Mass.) 130 (1826); Lee v. Gardiner, 26 Miss. 521, 537 (1849); Stokes v. Sanborn, 45 N. H. 274 (1864); Bank of Columbia v. Newcomb, 6 Johns. (N. Y.) 98 (1810) semble; Headley v. Roby, 6 Ohio, 522 (1834); Parnell v. James, 6 Rich. (S. C.) 370 (1853); Gardner v. Henry, 5 Cold. (Tenn.) 458 (1868).

Assumpsit will not lie on a domestic judgment. Vail v. Mumford, 1 Root (Conn.) 142 (1789); Wass v. Bucknam, 40 Me. 289 (1855); James v. Henry, 16 Johns. (N. Y.) 233 (1819); Bain v. Hunt, 10 N. C. 572 (1825); Woods v. Pettis, 4 Vt. 556 (1832). Accord. De Haven v. Bartholomew, 57 Pa. 126 (1868). Contra. But if the judgment is not a record, then debt on simple contract or assumpsit will lie. Williams v. Jones, 13 M. & W. 628 (1845) semble; Cole v. Driskell, 1 Blackf. (Ind.) 16 (1818); Wheaton v. Fellows, 23 Wend. (N. Y.) 375 (1840); Green v. Fry, Fed. Cas. No. 5,758 (1803). See, also, Mervin v. Kumbel, 23 Wend. (N. Y.) 293 (1840).

Debt on record will lie on the judgment of a sister state. Carter v. Crews, 2 Port. (Ala.) 81 (1835); Hoagland v. Rogers, 3 Blackf. (Ind.) 501 (1834); Hazzard v. Nottingham, Tappan (Ohio) 146 (1817); McIntire v. Caruth, 1 Tread. Const. (S. C.) 457 (1814); Hunt v. Lyle, 7 Yerg. (Tenn.) 412 (1834) semble.

Debt on simple contract and assumpsit will not lie on the judgment of a sister state. Morehead v. Grisham, 13 Ark. 431 (1853); Knickerbocker Co.

SECTION 2.—NECESSARY ALLEGATIONS

FORM OF COMMON COUNT IN DEBT.

(2 Chitty, Pleading [13th Am. Ed.] pp. *384, *386, *387.)

Ellenborough

——— next after ——— in Mich. Term, 1 Will. 4.

Middlesex (to wit) A. B. the plaintiff in this suit, complains of C. D. the defendant in this suit, being in the custody of the Marshal of the Marshalsea of our lord the now king, before the king himself, of a plea that he render to the said A. B. the sum of £——— of lawful money of Great Britain, which he owes to and unjustly detains from him. For that whereas, the said defendant, afterwards, to wit, on, &c. aforesaid, at &c. aforesaid, had and received a certain sum of money, to wit, the sum of £——— of lawful money, to and for the use of the said plaintiff, and to be paid by the said defendant to the said plaintiff when he the said defendant should be thereunto afterwards requested, whereby and by reason of the said last-mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the said plaintiff to demand and have of and from the said defendant the said last-mentioned sum of £———. Yet the said defendant (although often requested so to do,) hath not as yet paid the said sum of £——— above demanded, or any part thereof to the said plaintiff. But he to do this hitherto hath wholly refused, and still doth refuse, to the damage of the said plaintiff of £———, and therefore he brings his suit, &c.

FORM OF COUNT ON A BOND.

(2 Chitty, Pleading [13th Am. Ed.] pp. *384, *436.)

Ellenborough.

——— next ——— in Mich. Term, 1 Will. 4.

Middlesex (to wit) A. B. the plaintiff in this suit, complains of C. D. the defendant in this suit, being in the custody of the Marshal of the Marshalsea of our lord the now king, before the king himself, of a plea that he render to the said A. B. the sum of £——— of lawful

v. Barker, 55 Ill. 241 (1870); Garland v. Tucker, 1 Bibb (Ky.) 361 (1809); McKim v. Odom, 12 Me. 94, 108 (1835); Lanning v. Shute, 5 N. J. Law, 778 (1820); Andrews v. Montgomery, 19 Johns. (N. Y.) 162, 10 Am. Dec. 213 (1821); Mills v. Duryee, 7 Cranch, 481, 3 L. Ed. 411 (1813: leading case); Boston Factory v. Hoit, 14 Vt. 92 (1842); Kemp v. Mundell, 9 Leigh (Va.) 12 (1837). Accord. Hubbell v. Coundrey, 5 Johns. (N. Y.) 132 (1809). Contra. But if the judgment is not a record, these actions will lie. Graham v.

money of Great Britain, which he owes to and unjustly detains from him. For that whereas the said defendant heretofore, to wit, on the ——— day of ——— in the ——— year of our Lord ——— at ——— by his certain writing obligatory, sealed with his seal, and now shown to the court of our said lord the king, before the king himself here, the date whereof is a certain day and year above named, to wit, the day and year aforesaid, acknowledged himself to be held and firmly bound unto the said plaintiff in the sum of £——— above demanded to be paid to the said plaintiff; yet the said defendant (although often requested so to do) hath not as yet paid the said sum of £——— above demanded, or any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused, and still neglects and refuses so to do. To the damage of the said plaintiff of £10, and therefore he brings his suit.

Pledges, &c.

UNITED STATES v. COLT.

(Circuit Court of the United States, 1818. Pet. C. C. 145, Fed. Cas. No. 14,839.)

This was an action of debt, brought upon an embargo bond, in the district court, to June, 1811; and the declaration demanded twenty thousand dollars, which the defendant was alleged to owe and detain. It then recited the embargo law, laying the breach, by the defendant; "whereby the United States are entitled to demand a sum, not exceeding twenty thousand dollars, and not less than one thousand dollars, viz. twenty thousand dollars;" which it averred to be due to the plaintiffs and detained from them by the defendant. Upon nil debet pleaded, the jury found a verdict for four thousand dollars. [Case unreported.] The defendant took out a writ of error, returnable at April sessions 1812, of the circuit court; and the case now came on for decision.

WASHINGTON, Circuit Justice.[22] The question in this case is, whether the action is maintainable. The objection to the action of debt, where the penalty is uncertain is, that this action can only be brought to recover a specific sum of money, the amount of which is ascertained. It is said, that the very sum demanded, must be proved; and on a demand for thirty pounds, you can no more recover twenty pounds, than you can a horse, on a demand for a cow. Blackstone says (3 Bl. Comm. 154) that debt, in its legal acceptation, is a sum of money due, by certain and express agreement; where the quantity is fixed and does not depend on any subsequent valuation to settle it;

Grigg, 3 Har. (Del.) 408 (1842); Warren v. Flagg, 2 Pick. (Mass.) 448 (1824). See, also, Williams v. Preston, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179 (1830); Curtis v. Gibbs, 2 N. J. Law, 377, 384 (1805).

[22] Portions of opinion omitted.

and for nonpayment, the proper remedy is the action of debt, to recover the specific sum due. So if I verbally agree to pay a certain price for certain goods, and fail in the performance, this action lies; for this is a determinate contract. But if I agree for no settled price, debt will not lie, but only a special action on the case; and this action is now generally brought, except in cases of contracts under seal, in preference to the action of debt; because, in this latter action, the plaintiff must prove the whole debt he claims, or recover nothing at all. For the debt is one single cause of action, fixed and determined; and which, if the proof varies from the claim, cannot be looked upon, as the same contract of which performance is demanded. If I sue for thirty pounds, I am not at liberty to prove a debt of twenty pounds, and recover a verdict thereon; for I fail in the proof of that contract, which my action has alleged to be specific and determinate. But indebitatus assumpsit is not brought to compel a specific performance of the contract; but is to recover damages for its non-performance; and the damages being indeterminate, will adapt themselves to the truth of the case, as it may be proved; for if any debt be proved, it is sufficient.

The doctrine laid down by this writer, appears to be much too general and unqualified; although to a certain extent, it is unquestionably correct. * * * But, it is not essential, that the contract should be express, or that it should fix the precise amount of the sum to be paid. * * * So an action of debt may be brought for goods sold to defendant, for so much as they were worth. 2 Com. Dig. 365. So debt will lie for use and occupation, where there is only an implied contract, and no precise sum agreed upon. 6 Term. R. 63.

These cases prove, that debt may be maintained upon an implied, as well as upon an express contract; although no precise sum is agreed upon. * * *

After stating what constitutes a debt, and prescribing the remedy, Judge Blackstone proceeds to the evidence and recovery; and says, "the plaintiff must prove the whole debt he claims, or he can recover nothing." On this account he adds "the action of assumpsit is most commonly brought; because in that, it is sufficient if the plaintiff prove any debt to be due, to enable him to recover the sum, so proved, in damages." If this writer merely means to say, that where a special contract is laid in the declaration, it must be proved as laid; the doctrine will not be controverted. If debt be brought on a written agreement, the contract produced in evidence, must correspond, in all respects, with that stated in the declaration; and any variance will be fatal to the plaintiff's recovery. Such too is the law in all special actions in the case; but if Judge Blackstone meant to say, that in every case, where debt is brought on a simple contract, the plaintiff must prove the whole debt as claimed by the declaration, or that he can recover nothing; he is opposed by every decision, ancient and modern. * * * In the case of Walker v. Witter, Lord Mansfield is express

upon this point. He says, that debt may be brought for a sum capable of being ascertained, though not ascertained at the time of bringing the action; and he adds, that it is not necessary that the plaintiff should recover the exact sum demanded. In the case of Rudder v. Price, Lord Loughborough, who has shed more light upon this subject than any other judge, says "that long before Slade's Case, the demand in an action of debt must have been for a thing certain in its nature; yet, it was by no means necessary, that the amount should be set out so precisely, that less could not be recovered." In short, if before Slade's Case, debt was the common action for goods sold, and work done; it is more obvious, that it was not thought necessary to state the amount due, with such precision, as that less could not be recovered; for in those cases, as the same judge observes, "the sum due was to be ascertained by a jury, and was given in the form of damages." But yet the demand was for a thing certain in its nature; that is, it was capable of being ascertained, though not ascertained, or perhaps capable of being so, when the action was brought. Whence the opinion arose, that in an action of debt on a simple contract, the whole sum must be proved, I cannot ascertain. It certainly was not, and could not be the doctrine prior to Slade's Case; and it is clear, that it was not countenanced by that case. However, let the opinion have originated how it might, Lord Loughborough in the above case, denominates it an erroneous opinion, and says, that it has been some time since corrected. * * *

In this case the statute gives the action of debt, and I cannot perceive in what other form, than this one which has been adopted, the declaration could have been drawn. Had it claimed the smallest sum, it might have been less than the jury might have thought the United States entitled to recover; and yet, judgment could not have been given for more. I know of no precedent for a declaration in debt, claiming no precise sum to be due and detained, nor any principle of law, which would sanction such a form. On the other hand, I find abundant authority for saying, that the demand of one sum, does not prevent the recovery of a smaller sum, where it is diminished by extrinsic circumstances. Rule discharged.[23]

[23] Incledon v. Crips, 2 Salk, 658 (1702): Hughes v. Insurance Co., 8 Wheat. 294, 310, 5 L. Ed. 620 (1823). Accord.

So of debt on simple contract. Aylett v. Low, 2 W. Bl. 1221 (1778); Sage v. Hawley, 16 Conn. 106, 41 Am. Dec. 128 (1844); White v. Walker, 1 T. B. Mon. (Ky.) 34 (1824); Newlin v. Palmer, 11 Serg. & R. (Pa.) 100 (1824). Accord. Vaux v. Manwaring, Fortes. 197 (1714); Butler v. Limerick, Minor (Ala.) 115 (1823: when suit on writing). Contra.

So of debt on a record. McKenzie v. Connor, 1 Stew. (Ala.) 162 (1827) semble; Shelton v. Clark, 7 Ark. 194 (1846).

But an amount must be stated as the amount of the debt. McKenzie v. Connor, 1 Stew. (Ala.) 162 (1827: record); Wilson v. Lennox, 1 Cranch 194, 211, 2 L. Ed. 79 (1803: statute); Blane v. Sansum, 2 Call (Va.) 495 (1800: specialty).

The amount alleged in the beginning of the declaration is immaterial. Hampton v. Barr, 3 Dana (Ky.) 578 (1835); Boyd v. Sargent, 1 Mo. 437 (1824).

McGINNITY v. LAGUERENNE.

(Supreme Court of Illinois, 1848. 10 Ill. 101.)

TRUMBULL, J. This was an action of debt, commenced by the appellees against the appellant, upon a promissory note and an account. The declaration contains two counts, the first of which is special upon the note, and the second, the common money counts for goods sold, work done &c., all in one count. After the issues were found for the appellees in the Court below, the appellant entered a motion in arrest of judgment, which motion was overruled and judgment entered in favor of appellees for five hundred and eighteen dollars debt, and one hundred and seventy-nine dollars and thirty cents damages.

Several errors have been assigned, only one of which, the overruling the motion in arrest of judgment, we deem it necessary to notice, as that is decisive of the case. The declaration commences in debt, and the first count sets forth that the appellant on a certain day and year, at, &c., "by his promissory note of that date, by him made, for value received, four months after the date of said note, promised the said plaintiffs to pay them or their order without defalcation, the sum of four hundred and ten dollars," and concludes with a request and refusal to pay. This count is sufficient. It sets forth the legal effect of the note sued upon, and the liability to pay arises from the character of the instrument; hence the usual allegation, "whereby the said defendant then and there became liable to pay," &c. was wholly unnecessary. Nor is the count bad as a count in debt. The word promised is not used by way of averment to show the liability of the party to pay, but as descriptive of the instrument sued upon.[24]

The second count, however, is of a different character. That is not a special count upon a contract which of itself creates a debt and raises a liability to pay, but the general indebitatus count upon the implied promises of the appellant, and after setting forth that the appellant was indebted to the appellees in a certain sum of money, for money lent, goods sold, work done, &c., it concludes by averring that the appellant "in consideration thereof, promised the plaintiffs to pay them said last sum when thereunto requested," &c. This conclusion makes the second a count in assumpsit and not in debt.[25] Had the pleader intended it for a count in debt, he should have used the word agreed instead of the word "promised," or have stated the liability, so as to

[24] Mahan v. Sherman, 8 Blackf. (Ind.) 63 (1846). Accord.

So of debt on a specialty. Bank of State v. Clark, 2 Ark. 375 (1840); Smith v. Webb, 16 Ill. 105 (1854). There the promise of the defendant must be alleged. Sayre v. Rose, 3 N. J. Law, 742 (1811).

[25] Palmer v. Stavely, 12 Mod. 511 (1701) semble; Dalton v. Smith, 2 Smith, 618 (1805); Brill v. Neele, 3 B. & Al. 208 (1819); Mahaffey v. Petty, 1 Ga. 261, 265 (1846) semble; Metcalf v. Robinson, Fed. Cas. No. 9,497 (1841). Accord. National Bank v. Abell, 63 Me. 346 (1872); Payne v. Smith, 12 N. H. 34, 41 (1841). Contra.

have avoided the use of the latter word. This case comes directly within the decision made at this term in the case of Cruikshank v. Brown, 10 Ill. 75, and because of the misjoinder of counts in debt and assumpsit the judgment will have to be reversed. So long as the distinction between forms of action is kept up, parties must observe those distinctions or abide the consequences.

The only distinguishing feature between the common counts in assumpsit and in debt is, that in the one the word promised is used, and in the other it is not. If this distinction is disregarded, it will be impossible for a defendant to know from the declaration in which form of action he is sued, and consequently he cannot know how to frame his defence, as the pleading as well as the judgment in the two actions is different, and what would be a good defence, as for instance the statute of limitations of five years, if the action were assumpsit, would be no defence if the action were debt.

The judgment of the Circuit Court is reversed, and the cause remanded with leave to the appellees to amend their declaration.

Judgment reversed.

GREEN v. THORNTON.

(Supreme Court of Arkansas, 1847. 7 Ark. 383.)

Debt, determined in September, 1845, before Clendenin, Judge. The declaration had three counts on a writing obligatory for $110, neither count containing a breach in itself—there was a fourth count for money paid, and the fifth count was on an account stated. The breach was that the defendants had not paid the sum of money in the writing obligatory specified. There was a demurrer to the declaration for want of a breach; which was sustained as to the 2d and 3d counts and overruled as to the others. Final judgment was taken for the plaintiffs, the defendants refusing to say anything.[26]

Flanagin, for the plaintiffs. The writings described in the first and third counts are different from that described in the second; and it is uncertain to which the breach applies. It is immaterial whether the demurrer be sustained or not to the fourth and fifth counts; because a judgment even upon verdict, would be of no avail, as there is no breach in said counts. Saund. Plead. 157; 3 Cro. R. 415, 425, 486, 661.

The first count is defective because there is no allegation of presentment to the payor and notice to the assignor of non-payment. Chitty on Bills, 592. * * *

Jordan, for defendant. The only question is as to the sufficiency of the breach. The breach expressly denies the payment of the sum

[26] Parts of the statement of facts and of the argument of counsel omitted.

of money by the defendants in the said writing obligatory specified, which is sufficiently broad to show that the debt remained wholly unpaid. The words "the debt still remains wholly unpaid" distinctly negative the idea of payment, and are sufficient though the whole breach be not in the strict form of the most approved precedents. Dickerson v. Morrison, 5 Ark. 316. * * *

The fourth and fifth counts are good in form and substance, as they charge the defendants below with a joint indebtedness to the plaintiff, and negative the payment of the sum of money set out in each count.

JOHNSON, C. J. This case is brought into this court upon a demurrer to the declaration. The court below sustained the demurrer as to the second and third counts and overruled it as to the first, fourth and fifth. The breach of the contract being essential to the cause of action, must in all cases be stated in the declaration. The breach must obviously be governed by the nature of the stipulation. It should be assigned in the words of the contract, either negatively or affirmatively, or in words which are co-extensive with the import and effect of it. The declaration in this case contains five separate and distinct counts, and no breach is assigned except in the last and that simply negatives the payment of the sum of money in the writing obligatory specified. When the plaintiff inserts several distinct counts in his declaration, each of which is based upon a separate and distinct cause of action, and then postpones his breach until he concludes his last count, he must negative the payment of the several sums therein demanded. The breach in this case is not in the words of the contract either negatively or affirmatively, nor can it be said to be co-extensive with the import and effect of it. The first and second counts contain but few of the essentials of a good declaration and are wholly insufficient to fix any liability upon the endorser. They show no notice of non-payment by the maker or that the instrument sued upon had been protested for non-payment.[27] The third is in due form, and if a sufficient breach had been added, it would have been sufficient to put the defendants upon their defence.[28] The fourth and fifth are in the usual form of common counts for money laid out and expended and for an account stated, but are wholly insufficient for want of the necessary breach.[29]

[27] The fulfillment of conditions precedent and concurrent must be alleged in all special counts in debt. Sands v. Clark, 8 C. B. 751 (1849: simple contract); United States Co. v. Lodge, 58 Fla. 373, 50 South. 952 (1909: specialty); Hoy v. Hoy, 44 Ill. 469 (1867: specialty); Caldwell v. Richmond, 64 Ill. 30 (1872: specialty; concurrent condition) semble; Morgan v. Guttenberg, 40 N. J. Law, 394 (1878: specialty); Nelson v. Bostwich, 5 Hill (N. Y.) 37, 40 Am. Dec. 310 (1843: specialty); Slacum v. Pomery, 6 Cranch, 221, 3 L. Ed. 205 (1810: simple contract); Nottingham v. Ackiss, 110 Va. 810, 67 S. E. 351 (1910: simple contract).

A conditional note must not be stated as an absolute one. Nottingham v. Ackiss, 107 Va. 63, 57 S. E. 592 (1907).

[28] See next case.

[29] Hudspeth v. Gray, 5 Ark. 157 (1843); Buckner v. Blair, 2 Munf. (Va.)

We think that there can be no doubt but that the circuit court erred in sustaining any one of the counts in the declaration. The judgment is therefore reversed.

REYNOLDS v. HURST.

(Supreme Court of Appeals of West Virginia, 1881. 18 W. Va. 648.)

PATTON, J., announced the opinion of the Court.[30]

Benjamin S. Reynolds brought an action of debt against John W. Hurst in the circuit court of Harrison county on the 6th day of September, 1879, "for $600.00, damages $300.00." The defendant demurred to the declaration generally, pleaded conditions performed, on which issue was joined, and filed a special plea in writing, to which the plaintiff demurred generally. The court overruled the defendant's demurrer to the plaintiff's declaration and sustained the plaintiff's demurrer to the defendant's special plea. The case was tried by a jury, and a verdict was rendered for the plaintiff for $163.26, upon which judgment was rendered, with interest from the 5th day of January, 1881, and costs. Thereupon the defendant obtained a writ of error and supersedeas to this Court.

The declaration is on a penal bond or bond with collateral condition. The plaintiff declares in the usual form in the beginning of his declaration: "Benjamin S. Reynolds complains of John W. Hurst, who has been summoned to answer, &c., of a plea, that the defendant render unto the plaintiff the sum of $600.00, which to the plaintiff the defendant owes and from him unjustly detains," and then sets forth the obligation for $600.00, the condition annexed, and the breach of the condition, and concludes the declaration as follows: "And the plaintiff says, that by reason of the return of said logs to the said Gilbert L. and Amanda G. Hurst he hath sustained damages to the amount of $158.00, the value thereof as fixed by the judgment aforesaid, and that the said Gilbert L. Hurst and Amanda G. Hurst have both and each of them failed and refused to pay the plaintiff the said damages being the value of said logs as aforesaid, which have accrued to the plaintiff by reason of the return of said logs to the said Gilbert L. and Amanda G. Hurst, and that an action hath accrued to the plaintiff to have and demand the value thereof from the defendant; by reason whereof the plaintiff saith he hath been injured and hath sustained damage to the amount of $300.00. Hence he brings his suit, &c.

336 (1811); Douglass v. Central Land Co., 12 W. Va. 502 (1878). Accord. Goodchild v. Pledge, 1 M. & W. 363 (1836); Gebhart v. Francis, 32 Pa. 78 (1858). Contra.

One breach will do for several counts. Somerville v. Grim, 17 W. Va. 803 (1881).

In debt on a judgment, nonpayment must be alleged. Bank of Louisana v. Watson, 4 Ark. 518 (1842); Dewey v. Bradbury, 2 Tyler (Vt.) 201, 207 (1802) semble.

[30] Part of the opinion omitted.

The proposition is too plain for discussion, that in a declaration at common law upon a bond with collateral condition for the payment of money or for the performance of some specific duty it is necessary to aver the non-payment of the penalty, as well as the breach of the condition; and such are all the forms. 4 Rob. (New) Pr. 109; The State v. McClane, &c., 2 Blackf. (Ind.) 192 (official bonds are exceptions, etc.). A bond with collateral condition is a bond to pay money with a condition annexed to be void, if a collateral stipulation to do or omit something be complied with. At common law the penalty is forfeited by the breach of the condition, and then becomes a debt, and as such is recoverable by an action of debt, the relief to the obligor being in a court of equity alone, which was accustomed to enjoin the obligee from compelling the obligor to pay the penalty, provided the latter would pay the actual damages sustained in consequence of the breach of the stipulation. Subsequently by Stat. 8 and 9, William III, c. 2, § 8, instead of having to resort to a court of equity, the obligee could assign as many breaches of the condition, as he chose, and a jury ascertained the actual damages sustained by reason of the breaches; and upon this verdict, judgment was entered for the penalty of the bond, to be discharged by the payment of the damages assessed by the jury. This statute was adopted in 1 Rev. Code 1819, p. 509, § 82, and was continued in the Codes of 1849 and 1860.

Before these statutes only one breach could be assigned in an action of debt on a bond with collateral condition. The assignment of more was duplicity. However small the breach shown the whole penalty was recovered, and the party was driven into a court of equity to be relieved against the penalty. Coalter, Judge, in Allison v. Bank, 6 Rand. (Va.) 227. Upon breach of the condition the bond became forfeited, and constituted a debt.

There are two modes of declaring upon the bond, one by declaring upon it as a single bill without noticing the condition, in which case the defendant craves oyer of the condition and pleads performance, and the plaintiff replies by assigning breaches. The other is to set out the condition in the declaration and assign the breaches in it. Coalter, Judge, in Allison v. Bank, supra; Ward & Ellzey v. Fairfax Justices, 4 Munf. (Va.) 494; Nadenbush v. Lane, 4 Rand. (Va.) 413; Green v. Bailey, 5 Munf. (Va.) 246. Or if the defendant fails to plead, and the case goes to a writ of enquiry without plea, the plaintiff must assign his breaches by suggestion thereof in writing. In either mode the form of action is debt; and the defendant must demand the penalty of the bond and allege its non-payment as in all other cases of actions of debt. The cases are numerous on this subject in Virginia and are uniform, that in an action of debt non-payment of the debt demanded must be averred. Braxton's Adm'x v. Lipscomb, 2 Munf. 282; Green v. Dulany, 2 Munf. 518; Norvell v. Hudgins, 4 Munf. 496; Hill v. Harvey, 2 Munf. 525; Buckner et ux. v. Blair, 2 Munf. 336; Nicholson v. Dixon's Heir, 5 Munf. 198; Cobbs v. Fountaine, 3 Rand. 484;

Strange v. Floyd, 9 Grat. 474; Douglass v. Central Land Co., 12 W. Va., opinion of Green, Judge, 510, 511. * * *

Our statute, Code c. 131, § 17, differs from the provisions of 8 and 9 William III, c. 2, § 8, and 1 Rev. Code 1819, p. 509, § 82, continued in Codes of 1849 and 1860, before referred to, in that it provides in any "action for a penalty for the non-performance of any condition, covenant or agreement the plaintiff may assign as many breaches, as he thinks fit; * * * the jury impaneled in any such action shall ascertain the damages sustained or the sum due by reason of the breaches assigned including interest thereon to the date of the verdict, and judgment shall be entered for what is so ascertained," not for the penalty to be discharged by what is actually due, but for what is actually due.

It has been suggested, that by this change in the statute as to the form of the judgment to be entered in an action on a penal bond it is no longer necessary to sue for more than the plaintiff is entitled under the law to recover. Under the old law he could recover neither more nor less than the amount of the penalty, and therefore he had to sue for the penalty and allege its non-payment, but under the statute he can sue for what under the law he was actually entitled to recover. Without undertaking to discuss, whether in a proper action such a declaration could be maintained, it is obvious, that whatever he does sue for, whether the penalty of the bond or the sum actually due, (if that could be done at all) he must aver the non-payment of the sum demanded. He cannot demand the penalty of the bond, and aver the non-payment of some other sum. He can not sue for the sum actually due and aver non-payment of the penalty.

In the case at bar the declaration of the plaintiff in error declared upon the penalty of the bond and averred non-payment of the damages claimed and not non-payment of the penalty. I am of opinion, that the court improperly overruled the demurrer to the declaration on that ground. The demurrer should have been sustained. * * *

The other Judges concurred.

Judgment reversed. Case remanded.[31]

[31] Clark v. Russell, 2 Day (Conn.) 112 (1805) semble; Gregory v. Freeman, 22 N. J. Law, 405 (1850); Smith v. Jansen, 8 Johns. (N. Y.) 111 (1811) semble; Salmon v. Jenkins, 4 McCord (S. C.) 288 (1827); State v. Witherspoon, 9 Humph. (Tenn.) 394 (1848) semble; Strange v. Floyd, 9 Grat. (Va.) 474 (1852)

But in a suit on an official bond a breach need not be alleged. State v. McClane, 2 Blackf.(Ind.) 192 (1828); State v. Phares, 24 W. Va. 657 (1884).

MORRIS CANAL & BANKING CO. v. VAN VOORST.

(Supreme Court of New Jersey, 1843. 20 N. J. Law, 167.)

This was action on a bond with a special condition, that the Cashier of the Morris Canal & Banking Company, should faithfully discharge his duties.

The plaintiffs in the first instance filed a declaration, setting out the condition of the bond and assigning breaches. The defendant having pleaded to the breaches assigned, the plaintiffs applied to this court, in the term of May, 1842, for leave to amend their declaration by striking out the recital of the condition of the bond and the assignment of breaches and thus leaving their declaration general, as on a common money bond. The motion was granted and the amendment made. 19 N. J. Law, 9.

To the amended declaration, the defendant, after craving oyer and setting out the bond and condition, put in a special demurrer; and assigned for causes of demurrer, that the plaintiffs had not in their declaration set out any breaches of the condition of the bond; nor showed that they had sustained any damages by reason of any breach or breaches thereof.

HORNBLOWER, C. J. The court upon the argument of the previous motion to amend, 19 N. J. Law, 9, felt very unfriendly to the application; but as the effect of a denial would only have been, to force the plaintiffs to a discontinuance, and the commencement of a new suit, the motion was granted on payment of costs, &c.[32] Among other things, in opposition to that motion, it was urged, that according to the terms, and more especially the spirit and design of the statute of 8 and 9 W. 3, the plaintiffs ought to set out the condition of the bond, and assign the breaches in the declaration; and that therefore, notwithstanding the case of Bank of Eliz. v. Chetwood, 7 N. J. Law, 32, the plaintiffs having made their election, and by assigning breaches in the declaration, drawn out the defence, ought not now to be permitted to abandon that declaration, and by a new course of pleading, deprive the defendant of the defences indicated by her pleas. We might indeed have obviated that difficulty by imposing terms on the plaintiffs and requiring them, as a condition of their rule, to furnish the defendant with a specification or particular of the breaches intended to be assigned in the replication. But the plaintiffs might have rejected the rule, loaded with such a condition, and have resorted to a new action. The rule was therefore granted; but as this court, in the case of Bank v. Chetwood, had given no reasons for overruling the demur-

[32] If the plaintiff unnecessarily alleges the condition of the bond, and assigns breaches which are insufficient, he cannot maintain his declaration by rejecting the insufficient breaches as surplusage. Lunn v. Payne, 6 Taunt. 140 (1815); Ansly v. Mock, 8 Ala. 444 (1845); Love v. Kidwell, 4 Blackf. (Ind.) 553 (1838).

rer, and as that decision had never been satisfactory to the bar, nor to my own mind, I was willing to hear the matter fully discussed, if the defendant's counsel thought proper to raise the question upon demurrer to the amended declaration; and an intimation to that effect was given by the court, in pronouncing a decision upon that motion. Accordingly, the plaintiffs having amended their declaration in the manner proposed, the defendant, after craving oyer, and setting out the bond and condition, put in a special demurrer to the declaration; assigning for cause, that the plaintiffs had not therein set out or complained of any breaches of the condition of the bond; nor showed that they had sustained any damage by any breach or breaches thereof.

The matter has been very fully and ably debated by the counsel in this cause, and the result is, that the court feels itself compelled by the force of precedents, including the case of Bank v. Chetwood, 7 N. J. Law, 32, to overrule the demurrer. This seems to render it necessary for us, to state the reasons that would have led us to a different result, had it been an unsettled question; but the injustice and hardship of the rule are so glaring, that we have felt it our duty in the exercise of a power, which if not incident to the court, is clearly given to it in the one hundred and first section of the practice act, Elm. Dig. 432, to adopt a rule of practice in relation to suits on such bonds, which we believe will in part, at least, obviate the evils complained of; and to remedy which the legislature of New York have, by statute made it compulsory on plaintiffs to set out, the condition and assign breaches in the declaration.

The necessity of such a statutory provision, or of some rule of practice to meet the exigencies of the case, is apparent, from the consideration, that the rules of pleading never permit a departure. Every subsequent plea must sustain the first cause of action assigned, or the first defence that has been set up. Suppose then, a plaintiff declares generally as on a money bond; what can a defendant plead? He may indeed deny the bond, by pleading non est factum or he may plead per fraudum, or duress, or any other matter going to defeat the instrument itself. But he knows the bond is a good one and that it was given with a special condition to perform certain covenants or agreements; he is ignorant however of the ground of the plaintiff's complaint; he does not know in what particular the plaintiff intends to charge him with a breach of the condition, and he cannot plead in avoidance or in bar of any matter not alleged in the declaration. He is confined to the plea of performance of the whole condition; what then is the defendant's situation? The plaintiff in his replication assigns breaches. The complaint is new to the defendant; he may be a representative, as in this case; or a mere surety; upon inquiry he may find, that the principal had a release, or a license, or that there had been an accord and satisfaction for that breach, or he may discover some other matter, operating as a discharge, or an excuse for the

breach assigned; but he cannot plead it; he cannot depart from his first plea; he must insist upon performance, and stand or fall by that alone.

Again, such a construction of the statute as permits a plaintiff to declare generally, on such a bond, practically deprives a defendant of the benefit of the act authorizing him to plead several matters in his defence. If the declaration assigned the breaches, the defendant under the statute might plead more pleas than one to each of the breaches. But the "act to facilitate pleadings," Elm. Dig. 422, does not authorize a defendant to reply or rejoin several matters. This has been repeatedly settled. The consequence is, a defendant in an action like this, cannot rejoin several matters to any one breach assigned in the replication, even if the rule forbidding a departure in pleading, did not tie up his hands. Whereas, if the plaintiff was obliged to assign the breaches complained of, in his declaration, the defendant might meet each of them with such answers as the nature of his defence might require.

In view of these and other difficulties, and which I am inclined to think a fair construction of the 8 and 9 W. III would have obviated, the court has adopted the rule of practice referred to; a copy of which is hereto annexed.

Demurrer overruled with costs.[33]

[33] The condition itself need not be alleged. Ethersey v. Jackson, 8 T. R. 255 (1799); Holley v. Acre, 23 Ala. 603 (1853); Sterne v. Trott, 11 Conn. 559 (1836); Shelton v. French, 33 Conn. 489, 495 (1866); State v. Votaw, 8 Blackf. (Ind.) 2 (1846); Rand v. Rand, 4 N. H. 267, 277 (1828) semble; Reed v. Drake, 7 Wend. (N. Y.) 345, 349 (1831); Burkholder v. Lapp, 31 Pa. 322 (1858); Butcher v. Carlile, 12 Grat. (Va.) 520, 526 (1855); Minnick v. Williams, 77 Va. 758 (1883). Otherwise if the bond is lost. Rand v. Rand, 4 N. H. 267 (1828).

The breach of the condition need not be alleged. Homphrey v. Rigby, 2 Chitty, 298 (1816); Governor v. Wiley, 14 Ala. 172, 177 (1848); Gordon v. Atkinson, Morris (Iowa) 195 (1843); State v. Leonard, 6 Blackf. (Ind.) 173 (1842); Scott v. State, 2 Md. 284, 289 (1852); Fulkerson v. Steen, 3 Mo. 377 (1834); Reed v. Drake, 7 Wend. (N. Y.) 345 (1831); State v. Witherspoon, 9 Humph. (Tenn.) 394 (1848). Accord. Fenwick v. Peart, Hardin (Ky.) 6 (1805); Machiasport v. Small, 77 Me. 109 (1885) semble; State v. Harmon, 15 W. Va. 115, 128 (1879) semble. Contra.

Statutes requiring allegation of breaches in the declaration are common. Patrick v. Rucker, 19 Ill. 428, 439 (1858); State v. Harvey, 8 Blackf. (Ind.) 527 (1847); Payne v. Snell, 4 Mo. 238 (1835); Rule of Court, 20 N. J. Law, 170 (1843); Nelson v. Bostwick, 5 Hill (N. Y.) 37, 40 Am. Dec. 310 (1843); State v. Caffee, 6 Ohio, 150 (1833).

So real conditions subsequent need not be noticed in the declaration. Lesher v. United States Co., 239 Ill. 502, 508, 88 N. E. 208 (1909). Nor collateral stipulations. Brotherton v. Brotherton, 19 Wend. (N. Y.) 327 (1838). Accord. Davis v. Mead, 13 Grat. (Va.) 118 (1856). Contra.

HART v. TOLMAN.

(Supreme Court of Illinois, 1844. 6 Ill. 1.)

SHIELDS, J.[34] This is a writ of error to the Circuit Court of Jersey county. The action, debt on bond conditioned for the payment of money. The declaration contains two counts. There is a general demurrer to the whole declaration, which the Court below sustained. This decision is assigned for error.

The first count is bad. The bond sued upon contains a condition, that upon the release of Urial Downey from the obligation of a previous bond, he, the said Downey, should pay the appellant the sum of two hundred dollars; but there is no averment in the count that he has ever been released or discharged from the obligation of the previous bond. On the contrary, it shows that his representative is still liable on such bond for the amount of alimony decreed, which is one thousand dollars. * * *

The judgment of the Court below is, therefore, affirmed with costs.

Judgment affirmed.[35]

SHELDON v. HOPKINS.

(Supreme Court of New York, 1831. 7 Wend. 435.)

Demurrer to declaration. The declaration is in debt on a justice's judgment rendered in Vermont. The judgment is averred to have been recovered on, &c., at Manchester, in the county of Bennington, and state of Vermont, before J. P., Esquire, one of the justices of the peace within and for the county of Bennington, then and still being such justice, and having full power and competent jurisdiction in said cause by the confession of the defendant, and that by the consideration and judgment of the said justice, the plaintiff recovered judgment against the defendant for $171 debt or damages and $2.50 costs, &c. The defendant demurred.

NELSON, J. The declaration is no doubt defective in not setting forth facts sufficient to give jurisdiction to the justice.[36] The statute giving jurisdiction to the justice ought to have been pleaded.[37] It is

[34] Statement of facts and part of opinion omitted.

[35] Governor v. Ridgway, 12 Ill. 14 (1850); State v. Leavell, 3 Blackf. (Ind.) 117 (1832); State v. Votaw, 8 Blackf. (Ind.) 2 (1846); Whitney v. Spencer, 4 Cow. (N. Y.) 39 (1825); Brown v. Stebbins, 4 Hill (N. Y.) 154 (1843). Accord.

[36] Spooner v. Warner, 2 Ill. App. 240 (1878); Bridge v. Ford, 4 Mass. 641 (1808); People v. Koeber, 7 Hill (N. Y.) 39 (1844). Accord. Williams v. Jones, 13 M. & W. 628 (1845). Contra.

[37] Cone v. Cotton, 2 Blackf. (Ind.) 82 (1827). Accord.

well settled that the general averment of jurisdiction is not enough.[38] 3 Wendell, 267; 6 Id. 438. The defendant must have judgment; leave, however, is granted to the plaintiff to amend on payment of costs.

WHITECRAFT v. VANDERVER.

(Supreme Court of Illinois, 1850. 12 Ill. 235.)

This was an action of debt brought in the Christian Circuit Court, to recover a penalty under the statute for cutting trees. The declaration contains but one count, which is as follows: That they (the defendants) render unto the plaintiff the sum of eleven hundred and sixty-six dollars, which they owe to and unjustly detain from him; for that whereas theretofore, to wit, on &c. and from thenceforward continually, until the bringing of this suit, at &c., the said plaintiff was the owner of certain land (describing it) and that the said defendants, on, &c., and on divers other days and times, before the bringing of the suit, did fell sixty-eight elm trees, sixty-eight elm saplings, &c., &c., which said trees and saplings theretofore and up to the times of felling the same, as aforesaid, were standing and growing upon the land aforesaid, belonging to the plaintiff, as aforesaid. By reason whereof, and by force of the statute in such case made and provided, an action hath accrued to the said plaintiff, to demand and have of and from the said defendants a large sum of money, to wit, the sum of eleven hundred and sixty-six dollars, above demanded, yet &c., to the damage of the plaintiff of two hundred dollars. To this declaration there was a demurrer and joinder, and a plea of nil debet and issue joined thereon. The declaration was amended, and the cause was submitted to a jury, and a verdict was found for plaintiff for $476, Davis, Judge, presiding. The cause was tried at a special term in August, 1850. Motions for a new trial and arrest of judgment were made and overruled.

TRUMBULL, J.[39] All the facts stated in the declaration may be true, and yet the defendants below have committed no act that would subject them to this action. It is not alleged that they felled the trees without

[38] Clearly, in the absence of even such a general averment, the declaration is bad. Read v. Pope, 1 C. M. & R. 302 (1834); Ellis v. White, 25 Ala. 540 (1854).

If the court rendering the judgment is one of general jurisdiction, no averment of its jurisdiction is necessary. Robertson v. Struth, 5 Q. B. 941 (1844: foreign court); Rae v. Hulbert, 17 Ill. 572 (1856: foreign court); People v. Lane, 36 Ill. App. 649 (1890); Williams v. Preston, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179 (1830: foreign court); Wilbur v. Abbot, 58 N. H. 272 (1878); Chemical Bank v. Kellogg, 71 N. J. Law, 126, 58 Atl. 397 (1904) semble; Mink v. Shaffer, 124 Pa. 280, 290, 16 Atl. 805 (1889: foreign court); Pennington v. Gibson, 16 How. 65, 81, 14 L. Ed. 847 (1853). Accord. Kibbe v. Kibbe, Kirby (Conn.) 119, 126 (1786) semble; Downer v. Dana, 22 Vt. 337 (1850). Contra.

[39] Part of the opinion omitted.

having first obtained permission so to do from the owner of the land, nor even that they did the acts complained of with force and arms, or unlawfully.

The declaration, after setting forth the felling of the trees on the land of the plaintiff, alleges, that "by force of the statute in such case made and provided, an action hath accrued, &c." There is no statute giving an action of debt in such a case as that stated. The words of the law, R. S. ch. 104, sec. 1, are: "Any person who shall cut, fell, box, bore, or destroy, or carry away any black walnut, black, white, yellow, or red oak, white wood, poplar, wild cherry, blue ash, yellow or black locust, chestnut, coffee or sugar tree, or sapling, standing or growing upon land belonging to any other person or persons, without having first obtained permission so to do, from the owner or owners of such lands, shall forfeit and pay for such tree or sapling, so cut, felled, boxed, bored or destroyed the sum of eight dollars." The subsequent part of the same sections prescribes a penalty of three dollars for cutting, &c., trees of any other description than those before enumerated.

The want of permission from the owner is a necessary ingredient to constitute the offence, and he who would make a party liable under the statute, must allege all the facts upon which the statute creates the penalty. The rule is well settled, that when an action is given by statute which contains an exception in the same clause which gives the right of action, the plaintiff must negative such exception in his declaration, but if there be a subsequent exemption, that is a matter of defence, and the other party must show it to protect himself against the penalty. 1 Ch. Pl. 223; Teel v. Fonda, 4 Johns. (N. Y.) 304.

Here the qualification of the right of action, is contained in the very same section and clause of the statute which gives the right, and should, therefore, have been negatived in the declaration.[40] * * *

The declaration is also objected to, because it does not allege that the acts complained of, were done contrary to the form of the statute. This

[40] Spieres v. Parker, 1 T. R. 141 (1786); Brinkley v. Jackson, 2 Houst. (Del.) 71 (1859); Chapman v. Wright, 20 Ill. 120 (1858); Myers v. Carr, 12 Mich. 63, 71 (1863) semble; Gould v. Kelley, 16 N. H. 551, 562 (1845: case on statute). Accord.

So of an exception in a covenant. Tempany v. Bernand, 4 Camp. 20 (1814); Browne v. Knill, 2 B. & B. 395 (1821); Vavasour v. Ormrod, 6 B. & C. 430 (1827: debt on simple contract); Dunn v. Dunn, 3 Colo. 510 (1877).

But provisos contained in subsequent sections need not be noticed. Brinkley v. Jackson, 2 Houst. (Del.) 71 (1859); Myers v. Carr, 12 Mich. 63, 71 (1863) semble; Gould v. Kelley, 16 N. H. 551, 562 (1845) semble. The rule is the same where the proviso is in the same section. Steel v. Smith, 1 B. & Al. 94 (1817); Myers v. Carr, 12 Mich. 63, 71 (1863) semble; Bennet v. Hurd, 3 Johns. (N. Y.) 438 (1808); Teel v. Fonda, 4 Johns. (N. Y.) 304 (1809); Hart v. Cleis, 8 Johns. (N. Y.) 41 (1811).

So of a proviso in a covenant. Gordon v. Gordon, 1Starkie, 294 (1816); La Point v. Cady, 2 Pin. (Wis.) 515 (1850).

See, also, cases cited above p. 305, note.

particular allegation we deem unnecessary, provided it clearly appears from the declaration that the action is founded on a statute; Cook v. Scott, 1 Gilman, 333.[41] * * *

The judgment of the Circuit Court is reversed, and the cause remanded, with leave to the plaintiff below to amend his declaration.

Judgment reversed.

SECTION 3.—DEFENSES

FORM OF PLEA OF NIL DEBET.

(Martin, Civil Procedure, 385. Form 50.)

In the Common Pleas.

C. D. ats. A. B. } And the said C. D., by E. F. his attorney, comes and defends the wrong and injury, when, &c., and says that he does not owe the said sum of money (or "the said sum of £———") above demanded, or any part thereof, in manner and form as the said A. B. hath above thereof complained against him, and of this he the said C. D. puts himself upon the country, &c.

FORM OF PLEA OF NON EST FACTUM.

(Martin, Civil Procedure, 385. Form 49.)

In the King's Bench.

——— Term, ——— Will. IV.

C. D. vs. A. B. } And the said defendant, by E. F. his attorney, comes and defends the wrong and injury, when, &c. and says that the said indenture (or "articles of agreement," or "deed poll," as in the declaration) is not his deed.

And of this the said defendant puts himself upon the country, &c.

FORM OF PLEA OF NUL TIEL RECORD.

(3 Chitty, Pleading [13th Am. Ed.] *994.)

C. D. ats. A. B. } And the said defendant, by ——— his attorney, comes and defends the wrong and injury, when, &c. and says that there is not any record of the said supposed recovery in the said declaration mentioned, remaining in the said court of our said lord the

[41] Andrew v. Hundred, Yelv. 116 (1608) semble; Lee v. Clarke, 2 East, 333 (1803); Nichols v. Squire, 5 Pick. (Mass.) 168 (1827); Brown v. Hoit, Smith (N. H.) 53 (1804) semble; Cross v. U. S., Fed. Cas. No. 3,434 (1812) Contra.

king, before the king himself, in manner and form as the said plaintiff hath above in his said declaration alleged, and this the said defendant is ready to verify. Wherefore, he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against the said defendant, &c.

McGAVOCK v. PURYEAR.

(Supreme Court of Tennessee, 1868. 6 Cold. 34.)

JAMES O. SHACKELFORD, J., delivered the opinion of the Court.[42]

This is an action of debt, brought in the Circuit Court of Williamson County, on a promissory note for $4,000, dated 26th December, 1861, due four months after date, executed by John McGavock and James Park, payable to the order of S. S. House, L. H. Moseley and J. W. Hall. The declaration is in the usual form; to which the defendant pleaded: First, the general issue, nil debet; second, that the said note was discounted by the officers of the Planter's Bank, at Franklin, to raise money to purchase horses and other equipments of a regiment to be mustered into the service of the so-called Confederate government; that said money was loaned by the officers of said bank for the illegal purpose of raising troops to war against the government of the United States, and is, therefore, void, etc.; that the note was transferred after maturity, to the plaintiff, with a full knowledge of purposes for which it was borrowed. Issue was taken on the pleas. * * *

Upon the trial of the cause, His Honor charged the jury: Third—"That if Park and others, by the plea, stated the object of the money raised on the note, was to aid and assist the Confederate States in rebellion against the government of the United States, that such allegation will not be sustained by proof, that it was to aid the State of Tennessee, or any other body of men in such an illegal purpose, but that the special character of the illegal transaction cannot be shown under the general issue; it must be done by special pleas."

A judgment was rendered for Puryear. A motion for a new trial was overruled, and the record is filed for error. * * *

We think his honor erred in the instruction in which he ruled that, under the plea of the general issue in this case evidence could not be given of the illegality of the contract. No principle is more clearly settled than that, under the general issue in an action of debt, any matter that shows the debt is not owing, or a discharge of it, may be given in evidence. Mr. Chitty, in his work on Pleadings, vol. 1, page 481, says: "The defendant may give in evidence, under this plea, every matter that shows nothing was owing, or any other matter in discharge of the debt."

[42] Part of the opinion omitted.

Such being the settled rules of law in pleadings of this character, it is unnecessary to comment further upon the charge of His Honor, in which we think he misapprehended the rules applicable to the admissibility of testimony under the pleas filed in this case.

The judgment must be reversed, and the case remanded.[43]

OTT v. SCHROEPPEL.

(Supreme Court of New York, 1848. 3 Barb. 56.)

GRIDLEY, J.[44] This is an action of debt on an award, and the declaration contains two counts. The defendant pleaded nil debet to the whole declaration; four special pleas to the first count, and one to the second. The third and sixth pleas are respectively pleas of no award. To these pleas the plaintiff has demurred, and assigned as one of the causes of demurrer that the pleas amount to the general issue.

I. The plea of nil debet is an appropriate plea to an action of debt on an award, and is the general issue, putting in issue every allega-

[43] Fant v. Miller, 17 Grat. (Va.) 47, 67 (1866). Accord.

So of other defenses by way of excuse. Anonymous, 1 Mod. 35 (1669: eviction); Gargan v. School Dist. No. 15, 4 Colo. 53 (1878: discharge of surety before debt due by death of one principal obligor); Phœnix Co. v. Munday, 5 Cold. (Tenn.) 547, 553 (1868: false swearing by insured); Gillespie v. Darwin, 6 Heisk. (Tenn.) 21, 27 (1871: discharge of surety by acts of creditor); Beaty v. McCorkle, 11 Heisk. (Tenn.) 593 (1872: coverture); Crews v. Bank, 31 Grat. (Va.) 348, 358 (1879: stamp act); Keckley v. Bank, 79 Va. 458, 462 (1884: want of consideration where consideration presumed) semble.

The facts necessary to make a prima facie case are in issue under nil debet. Bates v. Hunt, 1 Blackf. (Ind.) 67 (1820); Dartmouth College v. Clough, 8 N. H. 22, 28 (1835); Brown v. Littlefield, 7 Wend. (N. Y.) 454 (1831).

Defenses in discharge may be proved under nil debet. Paramour v. Johnson, 12 Mod. 376 (1700: release) semble; Bailey v. Cowles, 86 Ill. 333 (1877: accord and satisfaction) semble; Page v. Prentice, 7 Blackf. (Ind.) 322 (1844: same and payment) semble; Stipp v. Cole, 1 Ind. 146 (1848: payment); Craig v. Whips, 1 Dana (Ky.) 375 (1833: payment); Phœnix Co. v. Munday, 5 Cold. (Tenn.) 547 (1868: false swearing by insured after company liable); Welsh v. Lindo, Fed. Cas. No. 17,409 (1808: former recovery).

The statute of limitations must be pleaded specially. Chapple v. Durston, 1 Cr. & J. 1 (1830); Smart v. Baugh, 3 J. J. Marsh. (Ky.) 363 (1830) semble; Lindo v. Gardner, 1 Cranch, 343, 2 L. Ed. 130 (1803); Butcher v. Hixton, 4 Leigh (Va.) 519, 527 (1833) semble. Accord. Anonymous, 1 Salk. 278 (1690); Draper v. Glassop, 1 Ld. Raym. 153 (1696); Richards v. Bickley, 13 Serg. & R. (Pa.) 395 (1825) semble; Murdock v. Herndon, 4 Hen. & M. (Va.) 200 (1809) semble. Contra.

But in debt for a statutory penalty the statute of limitations may be relied on under nil debet. Lee v. Clarke, 2 East, 333, 336 (1802); Gebhart v. Adams, 23 Ill. 397, 76 Am. Dec. 702 (1860) semble; Watson v. Anderson, Hardin (Ky.) 458 (1808); Estill v. Fox, 7 T. B. Mon. (Ky.) 552, 18 Am. Dec. 213 (1828); Moore v. Smith, 5 Greenl. (Me.) 490, 495 (1829); Pike v. Jenkins, 12 N. H. 255 (1841).

In a qui tam action former recovery must be specially pleaded, according to Bredon v. Harman, 2 Str. 701 (1726). So of fresh pursuit in debt for an escape, according to Bonafous v. Walker, 2 T. R. 126, 131 (1787) semble.

[44] Part of opinion omitted.

tion in the declaration. 1 Saund. Pl. & Ev. 180, 181. 1 Ch. Pl. (Ed. of 1837) p. 124, 517. Stanley v. Chappell, 8 Cow. 235. Ex parte Wallis, 7 Cow. 522. The plaintiff, therefore, is bound to prove a legal and valid award, under the issue upon the plea of nil debet. Now it is an established rule of pleading that when the defence consists of matter of fact, merely amounting to a denial of such allegations in the declaration as the plaintiff would under the second issue be bound to prove in support of his case, a special plea is bad, as unnecessary and amounting to the general issue. 1 Chit. Pl. 557, and cases there cited, and cases cited in the note, 950. We see no escape, therefore, from the conclusion, that the plea of no award, to an action of debt on an award is bad, as amounting to the general issue.[45]

II. The fourth plea admits the making of the award, but avers that on the last day for making it, the defendant requested the arbitrators to deliver the award, but that they neglected to do so. It was a condition of the bond that the award should be ready to be delivered to the parties on that day; and it is abundantly established by authority that a neglect to deliver on request disproves the allegation that it was ready to be delivered according to the conditions, on the happening of which the award was to be binding. Cald. on Arbit. 200; Perkins v. Wing, 10 Johns. 146; 1 Saund. Rep. 327, b, note 3; 2 Saund. Rep. 87, b, note 1; 3 Saund. Rep. 190, note 3; Buck v. Wadsworth, 1 Hill, 321. But it is argued that this plea, though good in substance, is bad on special demurrer, as amounting to the general issue. It is said with some plausibility in support of this argument, that the fact which constitutes the gist of the plea, is no more than a denial of a readiness to deliver, which readiness the plaintiff must establish affirmatively, on the trial. The answer to the argument is, that a readiness to deliver calls for no distinct proof from the plaintiff, independently of the making of the award; nor need the fact be averred in the declaration. See Bradsey v. Clyston, Cro. Ch. 541; 1 Saund. Pl. 327, b, note; 1 Saund. Pl. & Ev. 180. The plea therefore states a new and independent fact, and is not merely the denial of a fact which the plaintiff is bound to prove; and in several of the cases cited above, it was expressly held that the fact must be pleaded specially, and that the evidence of it could not be otherwise admitted. But if the fact might be given in evidence under the plea of nil debet, when the action is brought upon the award, it does not therefore follow that a special plea setting up this fact is bad. The rule does not prohibit a party from pleading specially all matters that are admissible under a plea of the general issue, but only such as constitute a mere denial of what the plaintiff is bound to prove in the first instance. The demurrer to this plea is therefore not well taken.[46]

* * *

[45] Harlow v. Boswell, 15 Ill. 56 (1853); Bates v. Hunt, 1 Blackf. (Ind.) 67 (1820). Accord. Compare 1 Chitty, Pleading (13th Am. Ed.) p. *473.

[46] Matters in excuse may be pleaded specially. Sarsfield v. Witherly, 2

The conclusion to which we have come therefore, is, that the demurrer to the third and sixth pleas, and to the replication to the second plea are allowed; and the demurrer to the fourth plea and to the replication to the fifth plea are overruled, and the parties are respectively allowed to amend on payment of costs.

LANDT v. McCULLOUGH.

(Appellate Court of Illinois, 1906. 130 Ill. App. 515.)

The defendant in error was the plaintiff below in an action of debt brought by him against the plaintiffs in error.

The suit was brought on the following bond:

"Know all men by these presents, that we, Charles C. Landt and Will H. Moore, are held and firmly bound unto James C. McCullough in the penal sum of five thousand dollars ($5,000.00) lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs and legal representatives, jointly and severally, firmly by these presents.

"In witness whereof, we have hereunto set our hands and seals this October 12th, 1892.

"The condition of the above obligation is such, that if, the said Landt and Moore, or their assigns, shall fully comply with the conditions of a certain lease dated March 20th, 1889, from said McCullough to one James M. Stebbins and assigned by said Stebbins to said Landt and Moore, as to the erection of buildings on a portion of the ground described in said lease, then this obligation to be null and void; otherwise in full force and effect.

"Charles C. Landt. [Seal.]
"Will H. Moore. [Seal.]"

* * * * * * * * * *

After some additional pleadings and orders and stipulations relating thereto, the cause stood for trial on the original declaration (amended by an increase of the ad damnum), and five additional counts thereto, and on a plea of non est factum (unverified) pleaded by the defendants.

* * *

BROWN, P. J., delivered the opinion of the court.[47]

The three points made by the plaintiffs in error in their argument are:

First. The evidence was insufficient in law to support the verdict.

* * *

Vent. 295 (1688) semble; Anonymous, 5 Mod. 18 (1694); Keckley v. Union Bank, 79 Va. 458, 463 (1884) semble.

So of matters in discharge. Bond v. Green, 1 Brownl. & G. 75 (1602); Anonymous, 5 Mod. 18 (1694); Hatton v. Morse, 1 Salk. 394; 3 Salk. 273 (1702) semble; Page v. Prentice, 7 Blackf. (Ind.) 322 (1844); Craig v. Whips, 1 Dana (Ky.) 375 (1833) semble.

[47] Parts of statement of facts and opinion omitted.

In support of the first point the argument is that no proof of the lease mentioned in the bond, nor any proof of the breach of the condition of the bond, having been made by the defendant in error, the verdict was unwarranted. But the answer is, that as the only plea in the cause was non est factum, no such proof was necessary.

By the common law this plea in an action of debt on a specialty only put in issue the giving of the deed, and it was not necessary for the plaintiff to prove the averments or breaches contained in his declaration—the plea admitted all material averments. Chitty on Pleading (9th American Edition) vol. 1, p. 483, note 2; Gardner v. Gardner, 10 Johns. (N. Y.) 47; Legg v. Robinson, 7 Wend. (N. Y.) 194.

This has always been and is now the law of Illinois. Prichett et al. v. People, 1 Gilman, 525, p. 530; Rudesill et al. v. Jefferson County Court, 85 Ill. 446; Smith v. Lozano et al., 1 Ill. App. 171, 176; King v. Sea, 6 Ill. App. 189, 192; Sugden v. Beasley, 9 Ill. App. 71, 73; Oberne v. Gaylord, 13 Ill. App. 30; Shunick v. Thompson, 25 Ill. App. 619, 626; Osborne & Co. v. Rich, 53 Ill. App. 661, 665.

No proof of the signature of the bond was required, for the plea was not verified. Rev. St. c. 110, § 33. * * *

The judgment of the Superior Court is affirmed.

Affirmed.[48]

EDWARDS v. BROWN, HARRIES & STEPHENS.

(Court of Exchequer, 1831. 1 Cromp. & J. 307.)

Debt upon a bond dated 12th October, 1826. The defendant, Brown, suffered judgment by default. The bond, as set out on oyer, appeared to be a bond given upon a mortgage for £1800. to the plaintiff. It recited that Brown was seised in tail of the mortgaged premises; that, by lease and release, of even date, the premises had been conveyed to make a tenant to the præcipe, that a recovery might be suffered; and the condition was, that if the recovery should be suffered in manner and form mentioned in the release, and so and in such manner as that under and by virtue of the recovery and of the release, the premises should be vested in the plaintiff in fee, according to the true intent and meaning of the release, the bond should be void. * * *

Stephens pleaded non est factum. * * *

[48] Rudesill v. Jefferson County Court, 85 Ill. 446 (1877); Oberne v. Gaylord, 13 Ill. App. 30 (1883); Utter v. Vanse, 7 Blackf. (Ind.) 514 (1845); State v. Ferguson, 9 Mo. 288 (1845) semble; Solomon v. Evans, 3 McCord (S. C.) 274 (1825). Accord. American Co. v. Burlack, 35 W. Va. 647, 658, 14 S. E. 319 (1891) semble. Contra.

The rule is the same in covenant. Clark v. Harmer, 5 App. D. C. 114 (1895); Burroughs v. Clancy, 53 Ill. 30 (1869); Sugden v. Beasley, 9 Ill. App. 71 (1881); Dale v. Roosevelt, 9 Cow. (N. Y.) 307, 312, 315 (1827); Cooper v. Watson, 10 Wend. (N. Y.) 202 (1833); Norman v. Wells, 17 Wend. (N. Y.) 136, 144 (1837); Goulding v. Hewitt, 2 Hill (N. Y.) 644 (1842); Courcier v. Graham, 1 Ohio, 330, 345 (1824); Denton v. Moore, 2 Tenn. 168 (1811).

At the trial, before Park, J., at the last summer assizes for the county of Hereford, it appeared, that Brown was seised of the premises in question for life only, and not in tail: so that, although the recovery was duly suffered, it could not vest in the plaintiff a fee. Russell, Serjt., tendered evidence to prove that Stephens had been induced by fraud to execute the bond, but the learned Judge was of opinion, that such evidence was not admissible under the plea of non est factum. The Jury found a verdict for the plaintiff. * * *

BAYLEY, B.,[49] now delivered the judgment of the Court, and, after stating the pleadings as above, proceeded thus: At the time of the trial, the defendant, Stephens, offered to prove that he was drawn in by fraud to execute the bond; but the learned Judge being of opinion that fraud could not be given in evidence upon non est factum, that evidence was rejected; and it is upon the ground that such rejection was improper that my Brother Russell obtained his rule nisi for a new trial.

I agree with my Brother Russell, that, whatever shews that the bond never was the deed of the defendant may be given in evidence upon non est factum. But if the party actually executes it, and was competent at the time to execute it, and was not deceived as to the actual contents of the bond, though he might be misled as to the legal effect, and though he might have been entitled to avoid the bond by stating that he was so misled, it nevertheless became, by the execution, the deed of the defendant, and he is not at liberty, upon the plea of non est factum, to say it was not.

The rule, as laid down in Gilbert's Evidence, 162, is this: "The only point in issue, and the controversy, on non est factum, is, whether the deed declared on be the act of the party, so that when the act is proved to be done, the whole matter denied by the defendant is proved to the Jury; but if there be any other circumstances to destroy that act, and avoid its binding force, that must be shown to the Court, that the Court may judge, and not the Jury, whether they are sufficient to avoid that deed." And we accordingly meet with many instances in which what would avoid the deed and destroy its binding force, both at common law and by statute, has been held inadmissible in evidence upon non est factum, and other instances in which it has been specially pleaded.

In Whelpdale's Case, 5 Rep. 119, the third resolution is: "Where a bond or other writing is by act of Parliament enacted to be void, the party who is bound cannot plead non est factum, but, in construction of law, the deed is to be avoided by the party who is bound by it, by pleading the special matter, taking advantage of the special matter; for although the act makes the bond or other writing void, yet thereto the law doth tacitly require order and manner, which the obligor ought to follow."

[49] Parts of statement of facts and of opinion omitted.

In Colton v. Goodridge, Bl. 1108, the defendant was not allowed, upon non est factum, to refer to the condition of the bond, to shew that it was in restraint of marriage, and therefore void at common law.

So, in Harmer v. Rowse, 6 Mees. & S. 146, the defendant was not allowed to prove, on non est factum to a bond, that it was given to stifle a prosecution for felony, and therefore void at common law.

In Thompson v. Harvey, 1 Show. 2, where the objection to a bond was, that it was in restraint of trade, which is a common law objection, it was pleaded specially; and in Collins v. Blantern, 2 Wils. 341, where the defence to an action on a bond was, that it was given to suppress a prosecution for perjury, it was pleaded specially; and in this, and the case of Thompson v. Harvey, the conclusion of the plea was not et sic non est factum, but, and so the bond was void in law.

But the authorities which come closest in this case, and press most strongly on my mind, are the cases of duress and threats. Every argument which can apply to a case where fraud is the defence, applies equally where threats or duress are the defence. The party is equally deprived of his free agency and uncontrolled judgment in either case. And yet, where duress or threats are the defence, there is authority upon authority that they cannot be given in evidence upon non est factum, but must be pleaded specially. The rule I have mentioned from Gilbert's Evidence, 162, is given as the reason why a man cannot give duress in evidence under non est factum.

In 1 Hen. 7, 15b, Keble lays it down, if a man confess an obligation to be his deed, he shall not conclude non est factum, as if he pleaded infancy; the same law is where he pleads that he made the obligation by duress of imprisonment.

So, in 14 Hen. 8, 28a, if a deed be made by duress of imprisonment, the defendant ought to conclude to the action, for it would be a false conclusion to say, et sic non est factum, for it was his deed.

Again, if an infant or a man by duress make an obligation, they shall demand judgment si actio, because the delivery of the deed was not void.

So, Doctrina Placitandi, 259, if a feme covert make an obligation, she may plead non est factum; but otherwise it is in case of an infant or of duress, for then it is only voidable; and, therefore, the parties cannot plead non est factum, but they shall say judgment si actio.

The second resolution in Whelpdale's case is to the same effect; and upon these authorities our opinion is, that the plea of non est factum in this case did not entitle the defendant to give the evidence he offered; and, consequently, that such evidence was rightly rejected.

* * *

Rule discharged.[50]

[50] Huston v. Williams, 3 Blackf. (Ind.) 170, 25 Am. Dec. 84 (1833) semble; Woolson v. Shirley, 6 Dana (Ky.) 308 (1838); American Co. v. Burlack, 35 W. Va. 647, 660, 14 S. E. 319 (1891) semble. Accord.

So of other defenses in excuse. Whelpdale's Case, 5 Co. 119a (1605: du-

VAN VALKENBURGH v. ROUK.

(Supreme Court of New York, 1815. 12 Johns. 337.)

This was an action of debt on a bill obligatory, or sealed note, and was tried before Mr. Justice Yates, at the Orange circuit, in August, 1814.

The defendant pleaded non est factum, and, at the trial, entered into evidence to show that the note had been fraudulently obtained, by substituting, in the place of the note which the defendant intended to execute, one for a much larger amount. To this testimony the counsel for the plaintiff objected, that it was inadmissible under the plea; but the judge overruled the objection.

It is unnecessary to state the testimony, as it is unnoticed in the opinion of the Court. It appears from the case to have been of a very vague and indefinite nature, consisting principally of loose conversations with the plaintiff, and none of it looking directly towards the species of fraud intended to be proved. It was proved, on the part of the plaintiff, that the defendant could read writing, and wrote a good hand.

The jury found a verdict for the defendant. The plaintiff moved to set aside the verdict, and for a new trial: 1. Because improper testimony was admitted. 2. Because proper testimony, offered by the plaintiff was overruled by the judge. 3. Because the verdict was against evidence.

ress) semble; Cole v. Delawn, 3 Keble, 228 (1673: infancy) semble; Harmer v. Rowe, 2 Chitty, 334 (1817: illegality); Chambers v. Games, 2 G. Greene (Iowa) 320 (1849: failure of consideration): Union Bank v. Ridgely, 1 Har. & G. (Md.) 324, 416 (1827: infancy) semble; Bollinger v. Thurston, 2 Mill, Const. (S. C.) 447 (1818: failure of consideration); Tyler v. Hand, 7 How. 573, 583, 12 L. Ed. 824 (1849: illegality) semble. Accord. Pigot's Case, 11 Co. 26b (1615: alteration where bond sued on in original form); Thompson v. Rock, 4 M. & S. 338 (1815: illegality). Contra.

So of excuses in covenant. Ratcliff v. Pemberton, 1 Esp. 35 (1793: rescission before breach); Stone v. Dennis, 3 Port. (Ala.) 231, 242 (1836: impossibility); Holcomb v. Canal, 3 Ill. 228 (1840: ultra vires) semble; Wilcox v. Cohn, Fed. Cas. No. 17,640 (1866: consent to breach); University v. Joslyn, 21 Vt. 52, 64 (1848: maintenance) semble. Accord. Dale v. Roosevelt, 9 Cow. (N. Y.) 307, 311 (1827: illegality) semble. Contra.

Coverture may be relied on under non est factum. Debt. Cole v. Delawn, 3 Keble, 228 (1673) semble; Anonymous, 12 Mod. 609 (1703); Lambert v. Atkins, 2 Camp. 272 (1809); Huston v. Williams, 3 Blackf. (Ind.) 170, 176, 25 Am. Dec. 84 (1833) semble. Covenant. Anonymous, 6 Mod. 230 (1705) semble; Dale v. Roosevelt, 9 Cow. (N. Y.) 307, 311 (1827) semble.

So of lunacy. Debt. Yates v. Bowen, 2 Str. 1104 (1739); Faulder v. Silk, 3 Camp. 126 (1811). Covenant. Dale v. Roosevelt, 9 Cow. (N. Y.) 307, 319 (1827) semble.

Defenses in discharge must be specially pleaded. Debt. Wells v. Needham, 2 Lutw. 995 (1697: foreign attachment) semble; Bailey v. Cowles, 86 Ill. 333 (1877: accord and satisfaction); Ford v. Vandyke, 33 N. C. 227 (1850: payment); Postmaster v. Cross, Fed. Cas. No. 11,306 (1822: discharge of surety by acts of creditor). Covenant. Russell v. Fabyan, 28 N. H. 543, 61 Am. Dec. 629 (1854: payment); Wilcox v. Cohn, Fed. Cas. No. 17,640 (1866: accord and satisfaction).

SPENCER, J., delivered the opinion of the Court. The evidence in this case looks towards a substitution of an instrument of a larger amount, for the one the defendant supposed he was executing. Had it been made out satisfactorily that there had been a note drawn for a smaller amount, that the defendant was defrauded into executing the note in question, by its substitution at the moment of execution, I cannot perceive any objection to the admission of such proof; and if made out, I think it would avoid the instrument upon the issue of non est factum.[51] Chitty lays it down, that the defendant, on non est factum, may give in evidence that the deed was void at common law, ab initio; as that it was obtained by fraud, &c. Chitty, Pl. 479. The fraud he refers to must have been a fraud relating to the execution of the deed, for the issue involves only the execution of the instrument. In the case of an infant, he must plead infancy, and cannot give it in evidence on non est factum, because the deed is his, though he is not bound by it. A feme covert, having no capacity to contract, is not bound to plead coverture. If a deed be misread, or misexpounded to an unlettered man, this may be shown on non est factum, because he has never assented to the contract. So, if a man be imposed upon, and signs one paper while he believes he is signing another, he cannot be said to have assented, and may show this on non est factum.

I will not pretend to say that there is not a great deal of technicality in the application of the rule, as to the cases in which you may give

[51] Huston v. Williams, 3 Blackf. (Ind.) 170, 25 Am. Dec. 84 (1833) semble; Taylor v. King, 6 Munf. (Va.) 358, 366, 8 Am. Dec. 746 (1819) semble; American Co. v. Burlack, 35 W. Va. 647, 660, 14 S. E. 319 (1891). Accord. Evans v. Hudson, 5 Har. (Del.) 366 (1852). Contra.

So of any other facts disproving the execution of the instrument alleged. Stoytes v. Pearson, 4 Esp. 255 (1803: escrow, condition unperformed); Powell v. Duff, 3 Camp. 181 (1812: executed before fully written); Phillips v. Singer Mfg. Co., 88 Ill. 305, 307 (1878: obligee different); Mix v. People, 92 Ill. 549 (1879: terms different); Cully v. People, 73 Ill. App. 501 (1897: generally); Chicago Co. v. Clark, 87 Ill. App. 658 (1899: escrow, condition unperformed); Huston v. Williams, 3 Blackf. (Ind.) 170, 176, 25 Am. Dec. 84 (1833: drunkenness); Edelin v. Sanders, 8 Md. 118, 131 (1855: sued on as altered) semble; Ford v. Vandyke, 33 N. C. 227 (1850: terms different); Lancashire Co. v. Nill, 114 Pa. 248, 254, 6 Atl. 43 (1886: generally); Stuart v. Livesay, 4 W. Va. 45 (1870: agent without authority).

So in covenant. Mayelston v. Palmerston, 2 C. & P. 474 (1826: different party); Holcomb v. Canal, 3 Ill. 228 (1840: generally); Agent v. Lathrop, 1 Mich. 438, 445 (1850: agent without authority); Dale v. Roosevelt, 9 Cow. (N. Y.) 307, 311 (1827: drunkenness) semble; Bank v. Houston, 66 W. Va. 336, 343, 66 S. E. 465 (1909: escrow, condition unperformed).

Apparently that one may prove a defense under non est factum does not prevent him from pleading it specially. Huston v. Williams, 3 Blackf. (Ind.) 170, 25 Am. Dec. 84 (1833: fraud preventing execution): American Co. v. Burlack, 35 W. Va. 647, 659, 14 S. E. 319 (1891: special traverse of execution) semble. Accord. Justices v. Sloan, 7 Ga. 31 (1849). Contra.

So in covenant. Bank v. Ridgely, 1 Har. & G. (Md.) 324, 416 (1827: escrow, condition unperformed) semble; Smith v. Justice, 6 Phila. (Pa.) 234 (1867: generally). Accord. Tillis v. Liverpool & L. & G. Ins. Co., 46 Fla. 268, 277, 35 South. 171, 110 Am. St. Rep. 89 (1903: generally). Contra.

evidence impeaching the execution of the instrument, under the plea of non est factum, and those in which you may not. In the present case, the defendant was not unlettered, and there is not sufficient proof to warrant the verdict, that there was a substitution of one instrument for another. There must be a new trial.

New trial granted.

GARGAN et al. v. SCHOOL DISTRICT NO. 15.

(Supreme Court of Colorado, 1877. 4 Colo. 53.)

STONE, J.[52] Goddard and Gargan entered into a written contract with the School District, appellee, for doing certain work in the building of a school house, and to secure the due performance of the contract on their part, they, together with Niemeyer and Getz, as sureties, executed a bond to the district in the penal sum of one thousand dollars.

This action is in debt on the bond, brought against Gargan and the sureties aforesaid (Goddard having died before performance of the contract), the breaches assigned being the failure of Gargan and Goddard in the life-time of the latter, and of Gargan afterward, to perform certain of the work specified in the contract, and for unskillful performance of portions of what was done, whereby damage accrued, etc.

The pleas are: 1st. Nil debet; 2d. Non est factum; 3d. Non-performance by plaintiff of conditions as to payment; 4th. Non-performance as to conditions to be performed by plaintiff respecting the foundation of the building; 5th. Covenants performed; 6th. Nul tiel corporation; and 7th. Set off.

From the view which we take of this case under the state of the pleadings presented by the record, we do not deem it necessary to examine in detail all the questions offered for our consideration by counsel for appellants upon the very numerous assignments of error, and the elaborate briefs filed in the cause.

The plea of nil debet interposed was, in this action, bad on demurrer,[53] but having been replied to, the plaintiff was thereby put upon proof of every allegation in his declaration, and the defendants were at liberty to avail themselves of any ground of defense which in

[52] Parts of the opinion omitted.

[53] Robinson v. Beilby, 7 Mod. 237 (1734); Anonymous, 2 Wilson, 10 (1753: general demurrer); Wooster v. Clark, 2 Ark. 101 (1839); Kilgour v. Commission, 111 Ill. 342, 348 (1884); Noel v. State, 6 Blackf. (Ind.) 523 (1843); Bradford v. Ross, 3 Bibb (Ky.) 238 (1813); Butler v. Alcus, 51 Miss. 47 (1875); English v. City, 42 N. J. Law, 275 (1880); Gates v. Wheeler, 2 Hill (N. Y.) 232 (1842); Parkinson v. City, 85 Pa. 313 (1878) semble; Sneed v. Wister, 8 Wheat. 690, 5 L. Ed. 717 (1823); Dyer v. Cleaveland, 18 Vt. 241 (1846). Accord.

general might be taken advantage of under that plea.[54] 1 Chit. Pl. 483.

This plea puts in issue the existence of the debt at the time of pleading, and consequently any matter may be given in evidence under it which shows that nothing was due at that time, as payment, release or other matter in discharge of the debt. 1 Chit. Pl. 481. And hence under issue made by this plea as it stood, it was competent for the sureties to have shown the death of Goddard, one of the principals in the bond, in discharge of any liability thereafter. * * *

The doctrine that whenever a surety becomes bound for the performance of more than one person, his obligation does not extend beyond the death or retirement of any of those for whom he has engaged to be answerable, is established by an almost unbroken line of decisions, both English and American, reaching back for three quarters of a century. * * *

As a general rule such defense should be pleaded specially, and on behalf of the sureties alone, but as we have shown, under the plea of nil debet as it stood in this case, the defense might be made the ground of a proper motion.

The death of Goddard appeared in the evidence of the plaintiff, as well as upon the face of the declaration, and it was not, therefore, necessary for the defendants to introduce proof of the fact. Such being the case, the motion of the defendants for a new trial should have been granted on the ground that the verdict was against the evidence. * * *

The judgment of the district court will therefore be reversed.

THATCHER, C. J. I agree that the court below erred in entering a joint judgment against Gargan, Niemeyer and Getz, as the record, properly construed, shows that only Niemeyer and Getz appeared and pleaded to the action, and for this error, I think the judgment should be reversed. In this view Brother ELBERT concurs. As to the liability of the sureties for breaches of the building contract, occurring subsequent to the death of Goddard, no opinion is at present expressed.

[54] Rawlins v. Danvers, 5 Esp. 38 (1803) semble; Price v. Farrar, 5 Ill. App. 536 (1879); Miller v. Moses, 56 Me. 128, 140 (1868); Armstrong v. Hall, 1 N. J. Law, 178 (1793); Jansen v. Ostrander, 1 Cow. (N. Y.) 670, 676 (1824); Brubaker v. Taylor, 76 Pa. 83 (1874); Belser v. Irvine, 4 McCord (S. C.) 380 (1827); Hughes v. Kelly, 2 Va. Dec. 588, 30 S. E. 387 (1898). Accord. Crockett v. Moore, 3 Sneed (Tenn.) 145, 149 (1855). Contra.

In Pennsylvania it will not serve the purpose of non est factum. Parkinson v. City, 85 Pa. 313 (1878).

The rule in debt on a record is the same as in debt on a specialty. Tate v. Wymond, 7 Blackf. (Ind.) 240 (1844); Clark v. Mann, 33 Me. 268 (1851); Wright v. Boynton, 37 N. H. 9, 18, 72 Am. Dec. 319 (1858); Rush v. Cobbett, 2 Johns. Cas. (N. Y.) 256 (1801).

BUFORD & PUGH v. KIRKPATRICK.

(Supreme Court of Arkansas, 1852. 13 Ark. 33.)

This was an action of debt, brought by Buford & Pugh, against Kirkpatrick, on a judgment recovered by the plaintiffs against the defendant, in the "inferior court for the county of Stewart, in the State of Georgia," at February Term, 1849. There was a second count in the declaration, upon an account stated.

The defendant pleaded nil debet to both counts, and nul tiel record to the count on the judgment. After demurring to the first plea, plaintiffs entered a nol. pros. as to the second count in the declaration, and issue being made up to the second plea, it was submitted to the court. The plaintiffs read in evidence, a transcript of the judgment sued on, the court found for defendant, plaintiffs excepted, put the transcript of record, and brought error. The objection taken to the transcript appears in the opinion of the Court.

WALKER, J., delivered the opinion of the Court.

We do not very readily perceive the grounds upon which the Circuit Court held the record in this case to be insufficient to sustain the issue on the part of the plaintiffs. From the argument of the counsel, however, we may infer that the objection was, that the judgment was void for the want of service or appearance of the defendant to that action.

The return on the writ is in the following words: "Served the defendant by leaving a copy of the original at his most notorious place of abode, July 19, 1848." It is true, this would not be a sufficient service under our statute, but it may, notwithstanding, have been valid under the statute of Georgia. The question is not, however, whether the service was so defective as to furnish grounds for reversing the judgment upon error or appeal, but whether the judgment is a mere nullity; for, unless void, it is conclusive of the rights of the parties in that suit until reversed or set aside. As a judgment of this court, it would, clearly, only be erroneous and reversible on error, but, until reversed, valid and obligatory. Borden v. State, 6 Eng. 525. And we have held in Barkman v. Hopkins et al., 6 Eng. 157, and May v. Jamison, 6 Eng. 372, that the record of a sister State is entitled to the same credit here, and alike conclusive, as if rendered in the courts of this State. It is true that judgment was taken upon constructive notice, and that the defendant failed to appear to the action. In case the defendant had been a non-resident of the State of Georgia, he might, by special plea, (as was done in the case of Barkman v. Hopkins,) have questioned the sufficiency of the service and the validity of the judgment. But this he has not done, and under the plea of nul tiel record, the court could not look beyond the record, but as we have remarked, it is to be received as a record, entitled to the same credit

that the records of our own courts are. It was, in other respects, informal, but is, nevertheless, the judgment of the court of a sister State, regularly certified, and corresponding with the declaration. The Circuit Court should therefore have received it as evidence under the issue of nul tiel record, and for as much as the court decided against the sufficiency of the record, its judgment must be reversed, and the cause remanded, to be proceeded in according to law; and with instructions to dispose of the issue at law, upon the plea of nil debet, which, as appears of record, remains in that court undetermined.[55]

JUDKINS v. UNION MUT. FIRE INS. CO.

(Supreme Judicial Court of New Hampshire, 1859. 37 N. H. 470.)

Debt, upon a judgment, recovered by the plaintiff against the defendants, before the Supreme Judicial Court of Maine. The defendants pleaded Nul tiel record, and Nil debet, with a set-off. To the first a replication was filed, and to the second a general demurrer.

It appeared by the record that the suit was commenced by the plaintiff, a citizen of Maine, against the defendants, a corporation doing business at Concord, in this county, by summoning several persons as trustees, and that no service was made on the defendants. The action was entered August term, 1854, and continued till March term, 1855, with an order of notice to the defendants. It did not appear that the order of notice was complied with, but at the March term, 1855, the record sets forth that the defendants appeared by their attorneys, and the action was continued until August term, 1855, when a trial by jury was had, resulting in a verdict for the plaintiff. The defendants

[55] Hunt v. Mayfield, 2 Stew. (Ala.) 124 (1829); Kimball v. Merrick, 20 Ark. 12 (1859); Forsyth v. Barnes, 131 Ill. App. 467 (1907: on erroneous grounds) semble; Hindman v. Mackall, 3 G. Greene (Iowa) 170 (1851); Shumway v. Stillman, 4 Cow. (N. Y.) 292, 15 Am. Dec. 374 (1825) semble; Wadsworth v. Letson, 2 Speers (S. C.) 277 (1844). Accord.

The assignment of the judgment to the plaintiff, where alleged, is not in issue on nul tiel record. Marx v. Logue, 71 Miss. 905, 15 South 890 (1894).

That judgment varies from allegation is open on nul tiel record. Snoddy v. Maupin, 7 T. B. Mon. (Ky.) 51 (1828) semble; Wright v. Weisinger, 5 Smedes & M. (Miss.) 210 (1845) semble.

Matters in excuse, not appearing from record, are admissible under nul tiel record, according to Forsyth v. Barnes, 131 Ill. App. 467; Id., 228 Ill. 326, 331, 81 N. E. 1028 (1907: coverture); Mervin v. Kumbel, 23 Wend. (N. Y.) 293, 301 (1840: error of judgment when available) semble.

Matters in discharge are not admissible under nul tiel record. Mason v. March, 3 Salk. 397 (1700: writ of error sued out) semble; Owens v. Chandler, 16 Ark. 651 (1856: payment) semble; Palmer v. Palmer, 2 Miles (Pa.) 373 (1840: collection enjoined).

A special plea denying judgment is bad. Green v. Ovington, 16 Johns. (N. Y.) 55 (1819) semble.

moved for a new trial, and the motion was transferred to the law term, where, in June, 1856, it was denied; and thereupon at the August term, 1856, judgment was rendered upon the verdict.

BELL, J.[56] The demurrer to the plea of nil debet brings before us the question decided by the Superior Court in the case of Thurber v. Blackbourne, in 1818, 1 N. H. 242; and we are asked to reconsider that decision. In that case it was decided that where it did not appear upon the record that the court of another State, by which a judgment in suit was rendered, has jurisdiction of the person of the defendant, by personal notice, or his appearance to the action, the plea of nil debet was a good plea. * * *

If all judgments rendered in the State courts, whether rendered with notice or without, which were made valid within the State by the local statutes, were made equally effectual in every other State by the law of the United States, it might well be contended that they could be denied abroad, only as they must be at home, by a plea of nul tiel record; but if they are binding and conclusive in other States, only in case they were rendered on notice, or appearance, there must be some other form of pleading by which the questions of notice, or appearance, or the jurisdiction of the court, may be raised and tried; and, as has been observed, it has never been contended that the plea of nil debet is less suitable to raise these questions, than a special plea involving the validity of the judgment.

In suits upon judgments strictly foreign, the plea of nil debet opened the whole merits of the case to examination; and if that was a necessary effect of the plea, it might well be contended that it was impliedly forbidden by the law of the United States, which in effect declares that judgments of other States, duly rendered, shall not be reexamined upon the merits; but that is no necessary effect of the plea, and the courts, which have held that plea to be good, either directly or impliedly, have all held, since the case of Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88, at least, that when it was shown that the judgment in question was rendered upon due notice, or appearance, by a court of competent jurisdiction, no examination of the case, upon its merits, was allowed by the act of Congress. Many cases may be suggested, where the effect of a judgment of another State may be brought in question, where there is no opportunity to plead nul tiel record, or any other plea, as was the case in McElmoyle v. Cohen, 13 Pet. 312, 10 L. Ed. 177, and yet where full effect is given to the law of the United States, by limiting the inquiry as to the validity of the judgment to the jurisdiction of the court, as to the subject matter and the persons of the parties; and there is obviously no greater difficulty in thus limiting the inquiry upon the plea of nil debet than where, as in the allowance of claims against an insolvent estate, no pleadings

[56] Part of opinion omitted.

are required. There is no pretence to suggest that the law of the United States is not as effectually executed, under the plea of nil debet, as it can be under any newly invented special plea, denying the jurisdiction either of the case or the person.

That the jurisdiction of the court by which a judgment is rendered in both respects, may be inquired into, is sustained by a great preponderance of authority in the State courts. The results of the later decisions throughout the country are well stated by Perley, J., in Downer v. Shaw, 22 N. H. (2 Fost.) 280. "The judgments of courts of other States of the Union are foreign, except so far as their character has been changed by and under the constitution of the United States. After some fluctuation of opinion, the general principle appears to be now well established, that where the State court has jurisdiction, its judgment is conclusive in every other State; and that where the State court had no jurisdiction, the judgment is inoperative beyond the limits of the State where it was recovered. The record is prima facie evidence of any fact therein distinctly stated, that may be necessary to give the court jurisdiction;" and he refers to the able opinion of C. J. Shaw, of Massachusetts, in Gleason v. Dodd, 4 Metc. 335, where it was held, upon a full consideration of the authorities, that a judgment of another State is not entitled to full faith and credit under the constitution and laws of the United States, unless the court had jurisdiction of the parties as well as of the cause, and the defendant may impeach such judgment by proof that he had no legal notice of the suit, and never appeared therein and submitted to the jurisdiction of the court, either in person or by authorized attorney. As to any fact which is necessary to give the court jurisdiction, the judgment is not conclusive. It is prima facie evidence only, and may be traversed and contested by counter proof. The same positions are supported by the learned opinion of Paige, P. J., in Noyes v. Butler, 6 Barb. (N. Y.) 613, and in numerous authorities cited in these cases and elsewhere. Reference has already been made to the recent cases in the Supreme Court of the United States.

The case of Thurber v. Blackbourne, is supported by the decisions in this State during the period of forty years since its decision. Whittier v. Wendell, 7 N. H. 257, sustains it so far as it holds that a judgment rendered in another State, without notice, or an appearance, must be regarded as a nullity here; and the fact that a party was an inhabitant here, and was never notified of the suit, or appeared, or answered to the action, might well be pleaded in bar of the action, and the same facts must be equally fatal to its validity, when it is attempted to be set up as a defence under a brief statement. Rangely v. Webster, 11 N. H. 299, and Downer v. Shaw, before cited, distinctly support the same positions, which are also recognized in Morse v. Presby, 25 N. H. (5 Fost.) 303, in Eaton v. Badger, 33 N. H. 237, and in Wright v. Boynton, 37 N. H. 9, 72 Am. Dec. 319.

All these decisions, and every decision which holds that the want of jurisdiction, as to the parties, may be shown under any form of pleading whatever, strike at the foundation of the early decisions in the United States court, that nil debet is not a sufficient plea.

Upon these views, the demurrer must be overruled.[57]

[57] Hindman v. Mackall, 3 G. Greene (Iowa) 170 (1851); Bissell v. Briggs, 9 Mass. 462, 469, 6 Am. Dec. 88 (1813) semble; Hall v. Williams, 6 Pick. (Mass.) 232, 246, 17 Am. Dec. 356 (1828) semble; Wright v. Boynton, 37 N. H. 9, 18, 72 Am. Dec. 319 (1858). Accord. Hensley v. Force, 12 Ark. 756 (1852); Lanning v. Shute, 5 N. J. Law, 778 (1820); Evans v. Tatem, 9 Serg. & R. (Pa.) 252, 259, 11 Am. Dec. 717 (1823); Mills v. Duryee, 7 Cranch, 481, 3 L. Ed. 411 (1813); Hampton v. McConnel, 3 Wheat. 234, 4 L. Ed. 378 (1818). Contra.

CHAPTER III

COVENANT

DOUGLAS v. HENNESSY.

(Supreme Court of Rhode Island, 1887. 15 R. I. 272, 10 Atl. 583.)

STINESS, J.[1] The plaintiff sues in an action of covenant upon a bond, alleging as a breach that the defendant has neither performed the condition nor paid the whole nor any part of the penal sum. The defendant pleaded non est factum and a plea of performance. After verdict for the plaintiff, the defendant moved in arrest of judgment, upon the ground that an action of covenant will not lie upon this bond. Although actions of covenant upon an ordinary bond with defeasance are not common, yet they are not without authority to support them. The difficulty in such cases lies in finding a promise in the instrument. In this case, upon other counts in the declaration, the court has decided that the recital of an agreement in a bond, upon which the obligation may be defeated, is not equivalent to a covenant to perform the agreement. Douglas v. Hennessy, Index Z, 31, 15 R. I. 272, 7 Atl. Rep. 1. So in Hathaway v. Crosby, 17 Me. 448, cited by the defendant, the court found that the bond was strictly a bond of defeasance, and not a covenant to perform the act recited in the condition. The action was in debt. A statute provided that in actions upon bonds with a penalty, with a condition which provides for the performance of some covenant or agreement, the jury may assess the damages sustained by breaches of the condition thereof. Hence the court held that, as there was no covenant to perform the condition, the damages for its breach should not have been assessed by a jury. If the breach of the covenant sued upon is simply an omission to do the act, by the performance of which the bond might become void, an action of covenant will not lie; for in such cases there is no promise under seal to do it. Such was the case of Powell v. Clark, 3 N. J. Law, *518. But in the present case the covenant sued on is the promise to pay, which is claimed to lie in the words, "to which payment well and truly to be made I bind myself," etc. The question, then, is whether these words import a covenant to pay.

In Anon., 3 Leon. 119, it was held that the words, "I am content to give," etc., "did amount to as much as 'I promise' to pay," etc., and that either debt or covenant would lie.

Norrice's Case, Hardr. 178, sustained an action of covenant on the words, "I oblige myself to pay so much money at such a day, and so much at another day."

[1] Statement of facts and part of opinion omitted.

March v. Freeman, 3 Lev. 383, was an action of debt on a sealed bill. The court says: "In every case where a covenant is to pay a certain sum, the party may have either debt or covenant for the money."

In Hill v. Carr, 1 Ch. Cas. 294, frequently cited upon this point, the chancellor, Lord Nottingham, remarks: "And a covenant will lie on a bond, for it proves an agreement."

In 2 Sedg. Dam. (7th Ed.) 263, the learned author says: "A bond undoubtedly proves an agreement; but is the agreement proved, the one stated in the penalty, to pay the money for which the obligor declares himself bound, or in the condition?" If there be no agreement in the condition, it would seem necessarily to follow that the only agreement possible is an agreement to pay the penalty.

In U. S. v. Brown, 1 Paine, 422, Fed. Cas. No. 14,670, the action was covenant on bond, conditioned upon the faithful performance of the duties of an office. The court remark that covenant might probably be maintained upon the penalty of the bond, if the breach was properly assigned, because it contained an acknowledgment of indebtedness and a promise to pay, and the breach would be the non-payment of the money; but, as the breach alleged was misfeasance in office, an action of covenant would not lie.

Hill v. Rushing, 4 Ala. 212, was an action of covenant on an attachment bond, alleging as breaches that the defendants had not paid the penalty nor prosecuted the action. It was held that the action could be maintained.

State v. Woodward, 8 Mo. 353, was covenant on a sheriff's bond, alleging two breaches of the condition, followed by an averment that the defendants had not paid the penalty. The court says: "It is clear that, by the common law, an action of covenant was a concurrent remedy with debt on a single bill obligatory, or a penal bond subject to be defeated by the performance of conditions. In such an action the breach of covenant would be the non-payment of the debt in the one case; in the other the non-payment of the penalty." As the breaches assigned, however, were breaches of the condition, it was held that covenant would not lie. See, also, Taylor v. Wilson, 27 N. C. 214.

We think these authorities are sufficient to support the conclusion that an action of covenant may be maintained on the promise to pay, which the words of the bond import. * * *

Motion overruled.[2]

[2] To the cases cited by the court add Lee v. State, 22 Ark. 231 (1860). Accord. McLaughlin v. Hutchins, 3 Ark. 207, 214 (1841); Abrams v. Kounts, 4 Ohio, 214 (1829). Contra.

That covenant will lie for a "sum certain," not the penalty of a penal bond, see, in addition to cases cited by the court, Jackson v. Waddill, 1 Stew. (Ala.) 579 (1828) semble; Clark v. Harmer, 5 App. Cas. (D. C.) 114, 119 (1895); Hedges v. Gray, 1 Blackf. (Ind.) 216 (1822) semble; Outtoun v. Dulin, 72 Md. 536, 20 Atl. 134 (1890); Potts v. Point Pleasant Land Co., 49 N. J. Law. 411, 8 Atl. 109 (1887); Hall v. Stewart, 12 Pa. 211 (1849). See, also, Ames in 2 Harv. Law Rev. 56.

VAN SANTWOOD et al. v. SANDFORD.

(Supreme Court of New York, 1815. 12 Johns. 197.)

This was an action of covenant. The declaration contained four counts. The fourth count, that certain differences having arisen between the plaintiffs and one Isaac Newton, they, on the 22d of March, 1814, entered into articles of agreement, in the words following: (Setting forth the agreement to submit to arbitration verbatim.) "And hereupon the said defendant, on the 24th day of March, in the year aforesaid, entered into a guaranty, covenant, and agreement, in the words and figures following," to wit: (Setting forth the agreement of the defendant verbatim;) and which concluded in the following words: "Signed and sealed the 24th day of March, 1814. Stephen Sandford. [L. S.]" And by which the defendant guarantied the performance of the award of the arbitrators on the part of Newton, to the amount of 800 dollars. The plaintiffs, in this Court, then state an award of the arbitrators, that Newton should pay to them 680 dollars and 36 cents, in two days thereafter, and notice of the award to Newton, and to the defendant, that neither of them had paid the money; and that the defendant had not kept his said covenant and guaranty so by him made, &c.

To this count there was a demurrer and joinder.

SPENCER, J., delivered the opinion of the Court. The demurrer to the fourth count is well taken: the action is covenant, and it cannot be maintained but on a deed. The only averment or allegation of a deed is, "and hereupon the defendant, on the 24th of March, in the year aforesaid, entered into a guaranty, covenant, and agreement in the words and figures following;" Then the agreement is set out in hæc verba, with a conclusion, that it was signed and sealed with the name of the defendant and the locus sigilli, purporting to be a literal oyer of the agreement.

It must appear that the contract was under seal,[3] and the law will not intend that it was sealed, unless it be expressly averred to be so; and though the bond or deed, upon oyer, recite, "in witness whereof we have hereunto set our hands and seals," yet that does not amount to an averment,[4] but that the party must show that the bond or deed was actually sealed by the other. These principles will be found in Cable v. Vaughan, 1 Saund. 291, note 1, where all the cases are carefully and accurately collected. There are some words of art, such as indenture, deed, or writing obligatory which, of themselves, import that

[3] Southwel v. Brown, Cro. Eliz. 571 (1597); Moore v. Jones, 2 Ld. Raym. 1536 (1728); Pierson v. Pierson, 6 N. J. Law 168 (1822); Bilderback v. Pouner, 7 N. J. Law, 64 (1823); Macomb v. Thompson, 14 Johns. (N. Y.) 207 (1817). Accord.

[4] Moore v. Jones, 2 Ld. Raym. 1536 (1728); Hays v. Lasater, 3 Ark. 565 (1841). Accord.

the instrument was sealed;[5] but if it be alleged that J. S. by his certain writing,[6] demised or covenanted,[7] without averring that it was sealed, the Court will not intend that the writing was sealed. Cro. Eliz. 571, Ld. Raym. 2537; 8 Com. Dig. Fait. (A. 2.) Pleader, 2 W. 9, 14.

In the case of Warren v. Lynch, 5 Johns. 244, this Court decided, that a scrawl for a seal, with an (L. S.), was not a seal, and deserved no notice; and that calling a paper a deed will not make it one, if it want the requisite formalities. The oyer of the contract, therefore, set out in the count under consideration, can have no effect; for we cannot tell that the original differs from it, or possesses any of the properties of a seal.

The other objections taken by the defendant's counsel are not tenable, but it is not now necessary to consider them, as the count is bad for the reasons assigned.

Judgment for the defendant, with leave to amend on the usual terms.[8]

CHEWNING et al. v. WILKINSON.

(Supreme Court of Appeals of Virginia, 1898. 95 Va. 667, 29 S. E. 680.)

HARRISON, J. This action of covenant was brought upon the following paper:

"Whereas, H. R. Pollard, substituted trustee for P. H. Adams, with the consent of A. J. Chewning and C. R. Sands has paid me the sum of eight hundred dollars (800), which sum has been applied as a credit on my claim against P. H. Adams (I holding a second lien on the property sold by Chewning & Sands June 13, 1891), and which amount was applied towards the payment of several past-due notes held by the Planters' National Bank, Richmond, Virginia, and, together with the past-due interest and fees, amounting to the sum of (5,062.81), this amount of eight hundred dollars was deducted and allowed me with the consent of the above-named first lien holders, and at the suggestion of P. H. Adams, when it should have been applied towards the pay-

[5] Penson v. Hodges, Cro. Eliz. 737 (1600: writing obligatory: debt); Ashmore v. Rypley, Cro. Jac. 420 (1617: same); Atkinson v. Coatsworth, 1 Str. 512 (1714: indenture). Accord. Perkins v. Reeds, 8 Mo. 33 (1843). Contra.

[6] Southwel v. Brown, Cro. Eliz. 571 (1597); Moore v. Jones, 2 Ld. Raym. 1536 (1728). Accord.

[7] Hays v. Lasater, 3 Ark. 565 (1841); Wineman v. Hughson, 44 Ill. App. 22 (1892). Accord.

[8] If a deed be averred, delivery need not be expressly averred. Brown v. Hemphill, 9 Port. (Ala.) 206 (1839); Auditor v. Woodruff, 2 Ark. 73, 82, 33 Am. Dec. 368 (1839); Boyer v. Sowles, 109 Mich. 481, 67 N. W. 530 (1896). Accord. Sprowl v. Lawrence, 33 Ala. 674, 692 (1859). Contra.

Signing need not be alleged. Kidd v. Beckley, 64 W. Va. 80, 60 S. E. 1089 (1908).

ment of the debt of the first lien holders, who were A. J. Chewning and C. R. Sands:

"Now, therefore, I hereby bind myself, my heirs and assigns, to pay or make good any balance, not exceeding the sum of eight hundred dollars ($800), that may be due the said Chewning & Sands, as the first lien creditors of P. H. Adams as aforesaid, after the exhaustion of all the securities and the sale of all the property of P. H. Adams which the said Chewning & Sands may have as security for the payment of said debt. I hereby waive the benefit of my homestead exemption, as to this obligation. Witness my hand and seal this first day of July, 1891. E. Wilkinson. [Seal.]"

The declaration avers that a balance of $1,286.06 is due the plaintiffs, as the first lien creditors of P. H. Adams, after the exhaustion of all the securities and the sale of all the property of P. H. Adams which they have as security for the payment of their debt.

The defendant relied upon the pleas of "conditions performed" and "covenants not broken." The whole of the evidence of the defendant was directed to showing that before the paper sued on was executed the plaintiffs had received from the sale of the Adams property $1,000, which had not been credited upon their prior lien, but had been improperly applied to another debt; that if the $1,000 had been credited, as it should have been, upon the debt of the plaintiffs secured in the deed of trust, the defendant would owe nothing upon the undertaking sued on.

No jury was demanded, and all questions of law and fact were submitted to the court, upon consideration whereof the court held that the defendant was entitled to the credit claimed, ascertained that the true amount due the plaintiffs was $92.54, and gave judgment accordingly. Thereupon the plaintiffs moved the court to set aside its judgment, and instead thereof to enter judgment in their favor for $800 and interest, upon the ground that under the pleadings in the case the defendant could not show that he was entitled to the credit allowed by the court, and that the evidence did not show that the defendant was entitled to any such credit.

This motion was overruled, a bill of exceptions taken, and the case brought to this court.

The covenant sued on is affirmative, and therefore the plea of "conditions performed" was proper. There being no negative covenant in the obligation, the plea of "covenants not broken" was badly pleaded. The plea of "covenant performed" can only be supported by evidence which shows that the defendant has performed his covenant, and not by evidence showing that his own performance was excused by the act of the plaintiff or any other. 1 Bart. Law Prac. § 125; Fairfax v. Lewis, 2 Rand. (Va.) 20; Scraggs v. Hill, 37 W. Va. 706, 17 S. E. 185.[9]

[9] Aldridge v. Warner, 2 Port. (Ala.) 92, 98 (1835); Jones v. Johnson, 10 Humph. (Tenn.) 184 (1849); Rangler v. Morton, 4 Watts (Pa.) 265 (1835);

The evidence does not sustain the plea of covenants performed. The defendant should have filed a special plea setting forth the fact relied on, that the plaintiffs had failed to credit their debt with $1,000 properly applicable thereto, which credit would have left nothing due from the defendant, as an excuse for the nonperformance of his covenant. 1 Bart. Law Prac. § 125.

Our conclusion is, therefore, that the judgment of the circuit court must be set aside, and a new trial awarded the plaintiffs, with leave to the defendant to file such pleas as he may be advised will put in issue the defense upon which he relies.

Martin v. Hammon, 8 Pa. 270 (1848); Zents v. Legnard, 70 Pa. 192 (1872). Accord. Roosevelt v. Fulton, 7 Cow. (N. Y.) 71 (1827). Contra.

So of evidence that defendant did not make the covenant. Farmers' & Mechanics' Turnpike Co. v. McCullough, 25 Pa. 303 (1855); Hogan v. Carland, 5 Yerg. (Tenn.) 283 (1833).

So of evidence of an affirmative defense. Kincaid v. Brittain, 5 Sneed (Tenn.) 119, 125 (1857); Scraggs v. Hill, 37 W. Va. 706, 715, 17 S. E. 185 (1893) semble.

In Beardsley v. Knight, 4 Vt. 471, 477 (1832), it was held that under a denial of the breach of the covenant defendant could prove that plaintiff, who was evicted, was not assignee of the convenantee.

PART III

PRINCIPLES OF GENERAL APPLICATION

CHAPTER I

CONCERNING SUBSTANCE

SECTION 1. —DAMAGE

TERRELL v. McDANIEL.

(Constitutional Court of South Carolina, 1818. 1 Nott & McC. 343.)

Action of covenant on a deed. After verdict for plaintiff there was a motion in arrest of judgment on the ground that plaintiff had not alleged any special damage which he had sustained by reason of the nonperformance of the covenant by defendant.[1]

NOTT, J. Damages are either general or special. General damages are such as the law presumes to have accrued from the wrong complained of. Special damages are such as the party actually sustained, and are not implied by law. 1 Chitty on Pleadings, 385. Such damages as may be presumed necessarily to result from the breach of the contract need not be stated in the declaration. The law also presumes some damages to result from a breach of contract, and therefore special damages need not be alleged. But where the plaintiff expects to recover special damages, he must state them specially and circumstantially in order to apprise the defendant of the facts intended to be proven, or he will not be permitted to give evidence of such damages on the trial. 1 Chitty, 332. The general rule is, that it is sufficient to assign the breach in the words of the contract. Id. 326. An omission to set forth any special damage may deprive the plaintiff of the benefit of testimony, to which he would otherwise have been entitled; but it is not a good ground in arrest of judgment, except in cases where the special injury is the gist of the action; as in an action of slander for words not in themselves actionable.[2] In such cases, un-

[1] The statement of facts is abbreviated.

[2] Pollard v. Lyon, 91 U. S. 225, 236, 23 L. Ed. 308 (1875: slander); Swain & Son v. Chicago, etc., Co., 252 Ill. 622, 97 N. E. 247, 38 L. R. A. (N. S.) 763 (1911: private action for public nuisance). Accord. Treusch v. Kamke, 63 Md. 274 (1885: negligence); Swan v. Tappan, 5 Cush. (Mass.) 104 (1849: libel); Hurst v. Detroit City Railway, 84 Mich. 539, 48 N. W. 44 (1891: wrongful death).

less the special damage is set forth, there appears no cause of action on the face of the declaration.

The motion in this case must be refused.[3]

Justices COLCOCK, CHEVES and JOHNSON concurred.

JACKSONVILLE ELECTRIC CO. v. BATCHIS.

(Supreme Court of Florida, 1907. 54 Fla. 192, 44 South. 933.)

Action by Rose Batchis against the Jacksonville Electric Company. Judgment for plaintiff, and defendant brings error. Reversed.

WHITFIELD, J.[4] On January 11, 1906, the defendant in error filed in the circuit court for Duval county a declaration alleging that on December 2, 1905, the Jacksonville Electric Company was operating a certain street car in Jacksonville, and on that day the plaintiff was a passenger on said car; that plaintiff gave notice to the conductor to stop the car, which the conductor did, and, after said car had stopped, plaintiff arose from her seat and proceeded to the door to leave the car, and, when plaintiff got near the door, the car, without signal or notice, started again, and, on the conductor again signaling to stop, the car was by the carelessness and negligence of the motorman in operating stopped suddenly with a jerk, and by reason of said jerk the plaintiff was thrown over the back of one of the seats, inflicting upon her several internal injuries, which caused her, and still causes her, great pain and suffering, to the special damage of the plaintiff in the sum of $150 for medical attendance, $100 for board for herself and nurse, $25 for medicines and attendance, $50 for rent of her place of business, which she was compelled to keep closed during her confinement in her room for two weeks, $20 for wages to servant employed by her at her place of business, and in the further sum of $4,655 for injuries sustained by her and the pain and suffering she had endured, and plaintiff claims $5,000 damages. There was a plea of not guilty. The plaintiff recovered judgment for $1,000. A motion for new trial was overruled. The defendant excepted, and took writ of error.

The declaration alleges several internal injuries to the plaintiff which caused her great pain and suffering, to her special damage, in (1) medical attendance; (2) board for plaintiff and nurse; (3) medicine and attendance; (4) rent for plaintiff's place of business; (5) servant hire at plaintiff's place of business; (6) injuries sustained and pain and suffering endured—making a total of $5,000 claimed as special dam-

[3] The authorities are divided upon the question. See, for example, Terre Haute, etc., Co. v. Peoria, etc., Co., 182 Ill. 501, 55 N. E. 377 (1899); Mullaly v. Austin, 97 Mass. 30 (1867). Accord. Gould v. Allen, 1 Wend. (N. Y.) 182 (1828); James & Mitchell v. Adams, 16 W. Va. 245, 257 (1880). Contra.

[4] A portion of the opinion is omitted.

ages. There is no allegation of general damages to the plaintiff as the result of defendant's negligence beyond the total amount of the damages above alleged. Consequently the plaintiff is confined to the special damages alleged. Damages should not be recovered, no matter how fully proven, unless there is an appropriate allegation of the damage sustained. Evidence outside of the issues made by the pleadings should be excluded upon proper steps duly taken for its exclusion. See Atlantic Coast Line R. Co. v. Crosby, 53 Fla. 400, 43 South. 318, text 334.

Such damages as the law holds to be the direct, natural, and necessary result of the injury complained of may be recovered under a general allegation of damage, for the reason that the defendant is presumed to know the damages that directly and necessarily result from the negligence, and consequently will not be taken by surprise when evidence of such damage is admitted. Special damages are such as are not the necessary, but the direct, natural, and proximate, result of the injury complained of; and the defendant is not presumed to know of them.[5] Therefore such special damages should be specifically alleged, unless they are fairly included in other damages stated, or unless the law infers them from the facts alleged. Evidence of injuries that are not the natural and proximate consequence or result of the negligence alleged should not be admitted.

Under the allegations of the declaration of special damages sustained by the plaintiff, testimony as to amounts paid by the plaintiff as rent for her place of business, which she was compelled to keep closed during her confinement in her room for two weeks as the proximate result of the injury complained of, was properly admitted.

Testimony as to the loss of plaintiff's earnings in her occupation because of the injury was admitted over an objection by the defendant that "there is no allegation in the declaration in regard to loss of business."

If the loss to plaintiff of earnings in her occupation was a direct, natural, and necessary result of the injury complained of, so as to be covered by an allegation of general damages, there is no general allegation of damages in excess of the special damages claimed, and such damages are not specifically alleged. Loss of earnings cannot fairly be included in any damage stated, and cannot be clearly inferred from any facts alleged in the declaration. The allegations of damage because of injuries and pain and suffering clearly refer to injuries to the person, and not to pecuniary losses. Loss of earnings is not fairly included in or plainly inferable from the allegation of damages for rent paid for plaintiff's place of business which she was compelled to keep closed during her confinement in her room for two weeks. The objection to testimony as to losses by plaintiff of earnings in her occupa-

[5] For numerous cases recognizing and applying this rule, see 5 Ency. Pl. & Pr. 717–721; 2 Sutherland on Damages (3d Ed.) 1161, note 1.

tion should have been sustained in view of the allegations of the declaration. * * *

The court charged the jury that among the elements to be embraced in the measure of damages was plaintiff's "occupation and the losses she incurred in her earnings; and, in considering any losses incurred in her earnings, the jury have the right to consider plaintiff's occupation, the time of the year and its bearing on her business, her average earnings in her occupation, her loss by being compelled to abandon her business, and all the elements set forth in the evidence going to prove her loss." This charge was duly excepted to, and it is assigned as error.

Instructions to juries should be confined to the issues made by the pleadings. See Walker v. Parry, 51 Fla. 344, 40 South. 69; Hinote v. Brigman & Crutchfield, 44 Fla. 589, 33 South. 303.

As there was no allegation of general damages in addition to the allegations of special damages, and as there is no allegation of special damages to the plaintiff for loss of earnings in her occupation, and as such special damages are not fairly included in any damages alleged and cannot be clearly inferred from any facts alleged in the declaration, the jury should not have been instructed that the measure of damages embraced plaintiff's occupation and the losses she incurred in her earnings, and that all the elements set forth in the evidence going to prove her loss might be considered in determining the damages.

The evidence did not warrant the giving of the charges requested by the defendant and refused by the court.

The judgment is reversed, and a new trial awarded.

SHACKLEFORD, C. J., and COCKRELL, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

COREY v. BATH.

(Supreme Judicial Court of New Hampshire, 1857. 35 N. H. 530.)

Case. The declaration, in one of the actions, alleged that whereas there was, on the 8th day of July, 1855, a certain public highway in said town of Bath, which highway the said inhabitants of said town were then, and still are, bound to keep and maintain in good and sufficient repair, and free from all obstructions, and which highway leads from the foot of the Gilman hill, so called, up along the western bank of the Ammonoosuc river, in said Bath, by the farm on which Oliver Corey and Ira G. Corey live, to the town of Lisbon; and whereas, on said 8th day of July, 1855, said plaintiff was riding in a wagon in company with his wife and child on said highway, when, by reason of the defect, insufficiency and want of repair of said highway, about one-quarter of a mile above said Oliver Corey's place, and while slowly travelling in the travelled part of said highway, he, the said plaintiff, together with his wife and child, were thrown from his wagon with

great force and violence, and he, the said plaintiff, and the said child were greatly injured and damaged thereby.

In the other action by Corey and his wife, the declaration was similar, except that the injury was alleged to have been done to the wife, as follows: "When, by reason of the defect, insufficiency and want of repair of said highway, said Sally Corey, the said James R. Corey's wife, was thrown with great force and violence out of said wagon, together with her said husband and her said child, and she, the said Sally Corey, was greatly injured and damaged thereby."

The defendant filed a confession in common form, admitting damages to the amount of ten dollars.

The plaintiff, with his wife and child, were riding on Sunday, for the purpose of visiting his parents, who lived about twelve or fourteen miles from his residence. The defendants contended that the plaintiff could not recover, if it appeared that he was travelling on Sunday for the purpose merely of making a social visit to his friends; but the court overruled the objection, and instructed the jury that in this case the plaintiff might recover in the same manner as if he had been injured in travelling on any other day.

The defendant also contended that the plaintiff, under this declaration, could not be allowed to prove what particular injuries he sustained by the accident, none being specified in the declaration; and also that the plaintiff could not be allowed to prove in what particulars the road was defective and out of repair, none being specified in the declaration.

The court overruled both objections, and admitted evidence to show the particular injuries received, and the particulars in which the road was defective and out of repair, so far as they contributed to the accident.

The jury found a verdict for the plaintiff, which the defendants moved to set aside on account of the foregoing rulings and instructions of the court; and also moved in arrest of judgment, because the declaration does not specify in what respects the road was out of repairs; nor in what particulars the plaintiff was injured; nor allege any special damage to the plaintiff; nor that the plaintiff was in the exercise of ordinary care at the time of the accident; nor that the injury was caused by any defect, insufficiency or want of repair in that part of the highway mentioned in the declaration which was in the town of Bath.

PERLEY, C. J.[6] * * * Another objection made to the declaration is that it does not allege special damages. To maintain his action the plaintiff must show that he has sustained a special damage within the meaning of that term, as it is used in the statute. The gist of the action is the individual damage which the plaintiff has received; and the injury itself, which is the cause of action, is not a special damage,

[6] Portions of the opinion are omitted.

in the sense of that term, as it is commonly used in the law of pleading and evidence. The injury to the plaintiff is the substantial fact charged as the foundation of the action; and neither that, nor the natural and uniform effects of the injury, are special damages, in the legal and technical meaning of the term; but special damages in that sense are such as are caused by some incidental fact, or by the peculiar situation and circumstances of the party. To take a case which has been sometimes put for an illustration: If the plaintiff should declare in trespass that the defendant broke and entered his close, and there discharged a gun, he could not, without stating more, prove on trial that he had there a decoy for ducks, and that the ducks were scared away by the discharge of the gun. The plaintiff's damage from the disturbance of his decoy would not be the uniform consequence of discharging a gun on his land, and therefore the particular facts must be specifically stated, to show how the special damage was caused. So in declaring against a turnpike corporation for an injury to the plaintiff's horse, caused by a defect in their road, the plaintiff could not, without a special statement, recover damages for being detained by the accident, so that he lost the next train of railroad cars, and was obliged to remain on expense at a tavern; because the detention and consequent expense would not uniformly follow as the natural and uniform effects of such an injury, but would appear to be the necessary consequences, when the situation of the plaintiff was shown which caused the special damage.

In cases like this, the injury which the plaintiff has received in his person or property is the fact charged as the foundation of the suit; and if that is sufficiently described, according to the general rules of pleading, the natural consequences of the injury, such as follow from it without the aid of any incidental fact or any peculiar circumstances, are not special damages, and may be recovered without specification.

Does this declaration sufficiently describe the injury or damage complained of? It is not enough to allege that the road was out of repair, and the plaintiff was violently thrown from his carriage. All this would not amount to an actual, substantial injury, and a legal damage under the statute. The declaration must show, further, that the plaintiff suffered a substantial injury, and the general nature of it, whether it was to his person or his property; and, if to his property, to what property. But it is not necessary that the declaration should give a detailed statement of the bodily injuries received, or set out the particulars of the damage done to any article of his property. If the injury was to his person, it is enough to say generally that he was greatly injured in his body, or that he suffered a great bodily injury; so, if the injury was to some piece of his property, say to his carriage, it would be sufficient to allege that the carriage was greatly damaged, without describing the particular injuries to the different parts. In

Read v. Chelmsford, 16 Pick. (Mass.) 128, the averment was that the plaintiff was greatly injured in his body, without any more particular description of the injuries received; and this agrees with the rule of pleading that prevails generally in similar cases. In an action on the case for running down and damaging the plaintiff's barge, the injury may be stated generally. 2 Chitty's Pl. 283. So in a suit to recover damages for breach of a warranty on the sale of a horse. Whether the action is assumpsit or case, it is enough to allege generally that the horse was not sound, but unsound. 2 Chitty's Pl. 101, 217; Warren v. Litchfield, 7 Greenl. (Me.) 63. In cases where a general statement would have answered, if the plaintiff unnecessarily states particulars, he will be held to prove them as stated, unless the whole particular statement can be rejected, and leave the declaration sufficient. Bristow v. Wright, Douglas, 664. And general pleading, where it is allowable, is for that reason in most cases thought to be the safer.

The declaration in one of these suits alleges that the plaintiff and his wife and child were thrown from his wagon with great force and violence, and he and the child greatly injured and damaged thereby. Is this to be taken, after verdict, as a sufficient averment that the injury which the plaintiff received was bodily, and to his person? We think it is. The description of the accident and of the manner in which the injury happened would make it likely that a bodily injury would be received; and there is nothing stated from which it can be intended that any injury or damage of another character could befall the plaintiff. It is not alleged that the carriage was overset, or the horse thrown down, or anything else of a kind that could cause damage or injury to his property. When it is said that he and the child were thrown with great force and violence from the wagon, and both greatly injured, the natural and ordinary meaning of the language would be that the injury to himself and the child was bodily. Any other conclusion would do violence to the plain and obvious meaning of the statement. It amounts in substance to an allegation that the plaintiff received a great bodily injury, and that is sufficient, without setting out the particulars of the injury. * * *

Judgment on the verdict.[7]

[7] Ryerson v. Marseillis, 16 N. J. Law, 450 (1863), apparently contra. In defamation also by the great weight of authority, the special damage must be alleged with great particularity. See cases cited in 5 Encyc. Pl. & Pr. 767–769. Thus, where loss of customers is asserted, it is usually necessary to set out the names of the customers lost, unless it is impossible to do so or their numbers are so great as to make it impracticable. See Trenton Mutual, etc., Co. v. Perrine, 23 N. J. Law, 402, 414. 57 Am. Dec. 400 (1873).

Where injury is claimed as the result of a series of acts, it is not necessary to allege that damage followed from each act of the series. Oliver v. Perkins, 92 Mich. 304, 52 N. W. 609 (1892).

It is not necessary to allege the amount of damage. Mattingly v. Darwin, 23 Ill. 618 (1860); Groves v. Dodson, 8 Yerg. (Tenn.) 161 (1835: after verdict); Digges v. Norris, 3 Hen. & M. (Va.) 268 (1808).

ALLEN v. SMITH.

(Supreme Court of New Jersey, 1831. 12 N. J. Law, 159.)

The CHIEF JUSTICE [8] delivered the opinion of the court.

This cause comes before us on a writ of error to the Court of Common Pleas of the county of Essex. The action instituted in that court is upon a bond given to the plaintiff below, Moses Smith, as sheriff of that county, by Daniel K. Allen, one of the defendants and the others as his sureties, with condition that Allen, who had been arrested and was in custody under a capias ad satisfaciendum, should keep within the bounds of the prison of the county until discharged by due course of law; and the alleged breach of the condition is that he had not so kept himself, but that he had walked out of and departed from the said bounds. A verdict and judgment were rendered for the plaintiff.
* * *

5. The fifth error. Another bill of exceptions was taken to the charge of the court to the jury in relation to the damages.

The declaration in this action is not merely upon the penal part of the bond, but sets out the condition and contains an assignment of the breach in pursuance of the fifth section of the act concerning obligations, Rev. Laws 1821, p. 304, which has been taken almost literally from the statute of 8th and 9th Wm. 3. It concludes thus: "By means whereof and by force of the statute, etc., an action hath accrued to the said Moses Smith, sheriff as aforesaid, to demand and have of and from the said D. K. Allen, W. Cobb and R. Carrick the said sum of $3105.58 [the penalty] above demanded. Yet the said D. K. Allen, etc., have not as yet paid, etc., the said sum of $3105.58, but neglected, etc., to his damage $50. And therefore," etc. The defendants prayed the court to instruct the jury that they could not assess the damages at a greater sum than $50; but the court refused so to charge, and did charge that the damages laid in the conclusion of the declaration were merely nominal, and that the jury had a right to exceed that amount in the assessment.[9]

This charge to the jury was, I think, unexceptionable. The damages they were about to assess were, not merely the damages for the detention of the debt, but, according to the provision of the statute, for the breach which the plaintiff had assigned and which he had proved. The damages mentioned in the conclusion of the declaration are for the detention of the debt, pro detentione debitis; and, however, in assessing damages on that account, the jury ought not to exceed the amount laid by the plaintiff, the same limit is not prescribed to them, when making diverso intuitu, an assessment for the breach. It

[8] A portion of the opinion is omitted.

[9] That the plaintiff is, in actions sounding in damages, limited to the damages alleged in the declaration, see Hoblins v. Kimble, Bulst. 49 (1611), Davenport v. Bradley, 4 Conn. 309 (1822), and numerous other cases cited in 5 Encyc. Pl. & Pr. 712.

is true that Chitty directs "the amount of the penalty or upwards" to be inserted in the conclusion of the declaration. 2 Chitty, 156, note. And Archbold says it is usual to do so. Arch. Pl. 170. But neither refers to any authority, nor do I find any case on the point. Sergeant Williams, however, in his note, 2 Saund. 187c, directs that the declaration should conclude, not as in covenant, but as in debt; where the damages are, in general, formal and nominal only, and a small sum is usually inserted. 1 Chitty, Pl. 360. Before the statute 8th and 9th Wm. 3, the plaintiff had judgment for the penalty and nominal damages and costs, and was entitled to execution for the whole. 1 Saund. 58, n. 1. Under the statute the jury are to assess the damages for the breaches, besides a verdict as before; and judgment is to be entered for the penalty, nominal damages and costs, without including the damages assessed for the breaches by the jury. 1 Saund. Id.; 1 Dunlap Prac. 392. In Smith v. Jansen, 8 Johns (N. Y.) 115, Kent, J., said, "It would seem to be the better construction of the act that the assessment is only to regulate the sum to be levied on the execution, and that judgment is to be entered as if there had been no assessment."

Hence it follows that as the damages assessed for the breach are not to be included in the judgment, but the damages for detention only and costs, there will be no incongruity between the amount in the conclusion of the declaration and the amount in the judgment, by reason of the amount of damages for the breach being, as it will generally perhaps always be, greater than for the detention of the debt. I can perceive no satisfactory reason for the direction given by Chitty, which has afforded the foundation of the exception now under consideration, and I can find in it no authoritative force. This direction I am warranted in saying has not been the rule of our practice. And the case of Hankin v. Broomhead, 3 Bos. & Pul. 607, shows that it is not adhered to in England. The damages were there laid at £200. The assessment was to a much larger sum; and no objection on that ground was made. The precedents in the English books farther show that it is not adhered to there. In 5 Wentworth, 490, the penalty was £100, the damages in the conclusion, £20. In Plead. Ass. 366, the penalty, £100, the damages, £5. In 2 Saund. 80, the penalty, £100, the damages, £10. In 5 Wentw. 548, the penalty, £3000, the damages £20. And of these, the first three were on bonds of the same kind as the precedent in Chitty; and the whole may be justly said to outweigh his unsupported direction.

6. The next error alleged in the plaintiffs' brief is that the jury have actually found a greater sum of damages than $50. What I have already remarked on the last point furnishes a satisfactory answer, in my judgment, to this alleged error.

7. The last error urged in the plaintiffs' brief is in the amount of the damages adjudged by the court for the detention of the debt as well as for the costs and charges. The amount so adjudged is $63.46,

exceeding the $50 claimed as damages in the declaration; and herein, it is said, is error. The sum mentioned in the judgment, it is to be observed, is not merely damages for the detention of the debt. If so, it would be erroneous, as beyond the sum demanded. But it is also in part for the costs and charges; and the amount of both, damages and costs, may exceed the sum claimed in the conclusion of the declaration. Pilford's Case, 10 Co. 115, is in point in answer to this alleged error. Pilford brought trespass against Dawks, and laid his damages at £40 and had judgment for £40 damages with costs, and costs of increase, amounting in all to £50. Error was assigned for that the damages and costs together amounted to more than the damages alleged in the declaration. The subject was very fully discussed, and the court agreed it to be good law that the plaintiff shall never recover more damages than he has declared for, that is to say, damages for the wrong done, but expensæ litis may be added thereto; and the judgment was affirmed.

Upon the whole I find no sufficient cause for the reversal of the judgment.

FORD and DRAKE, JJ., concurred.

Judgment affirmed.[10]

SECTION 2.—VALUE

HAWKINS v. JOHNSON.

(Supreme Court of Indiana, 1832. 3 Blackf. 46.)

Appeal from the Martin Circuit Court.

BLACKFORD, J.[11] This was an action of debt by Johnson against Hawkins, Smith, and Davis. The declaration states that an execution in favour of Johnson against Hawkins was levied by Love, the sheriff, upon a horse, saddle, and bridle, the property of Hawkins; that Hawkins, Smith, and Davis executed a bond payable to Love, sheriff, in the penalty of 400 dollars, conditioned that Hawkins should deliver the property to Love, sheriff, to be sold by him at the house of John P. Davis, on the 20th of May then next following, by the hour of

[10] Phillips v. Runnels, 1 Morris (Iowa) 391, 43 Am. Dec. 109 (1845); Harrison v. Park, 1 J. J. Marsh. (Ky.) 170 (1829); Winslow v. Commonwealth, 2 Hen. & M. (Va.) 459 (1808). Accord. Fournier v. Faggott, 3 Scam. (Ill.) 347 (1842); Stephens v. Sweeney, 7 Ill. 375 (1845); Russell et al. v. City of Chicago, 22 Ill. 283 (1859); Brown v. Smith, 24 Ill. 196 (1860). Contra.

On right to remit excess before judgment, see Linder v. Monroe, 33 Ill. 388 (1864); Barber v. Rose, 5 Hill (N. Y.) 76 (1843); after judgment, Bealle v. Schoal, 1 A. K. Marsh. (Ky.) 475 (1819); Johnson v. Robertson, 1 Mo. 615 (1826); Dennison v. Leech, 9 Pa. 164 (1899); Fowlkes v. Webber, 8 Humph. (Tenn.) 530, 534 (1847).

[11] A portion of the opinion is omitted.

11 o'clock; and that the bond is defective, in being made payable to the sheriff instead of to the execution-plaintiff, the latter being the party interested. The breach assigned is that Hawkins did not, on the said 20th day of May, at 11 o'clock, nor at any other time since the making of the said writing obligatory, deliver the horse, saddle, and bridle, nor either of them, to Love, sheriff, etc. The defendants demurred generally to the declaration, and the court gave judgment for the plaintiff.

The appellants, defendants below, rely for a reversal of the judgment on the following grounds: * * *

The last objection is that there is no averment of the value of the property agreed to be delivered. This omission, in an action like the present, is no objection on general demurrer. It might be a substantial defect in detinue, where the action is for the goods themselves or their value. But in trespass, or trover, or in suits on contracts for the delivery of property, the averment of the value is only matter of form. The Mayor, etc., of Reading v. Clarke, 4 Barn. & Ald. 268.

PER CURIAM. The judgment is affirmed, with 5 per cent. damages and costs.

SECTION 3.—AGENCY

NICHOLSON † v. CROFT.

(Court of King's Bench, 1761. 2 Burrows. 1188.)

This was a question (upon the master's report), "Whether there were, or were not, more counts inserted in the declaration, than were necessary."

It was a declaration upon a policy of insurance, consisting of seven counts; 1st, for a total loss, on a policy subscribed by the defendant himself; 2d, for an average loss, (averred to amount to £63. 4s. 6d.) on a policy subscribed by the defendant himself; 3d, for £6 per cent. to be returned, (it being averred "that the ship departed with convoy,") on a policy subscribed by the defendant himself; 4th, 5th, and 6th, exactly the same with the 1st, 2d, and 3d, (respectively,) with this difference only, that these three last counts alledged the policy to have been subscribed by one Manoel Francis Silva, the defendant's then agent, factor, or servant, in that behalf by him duly authorized, appointed, and deputed, for that purpose; 7th, for money had and received to the plaintiff's use. The master (Mr. Owen) thought that four counts were sufficient; viz., either the three first with the last; or else the 4th, 5th, and 6th, together with the last.

The court agreed with him in opinion.

† Nichleson (in 3d Ed.).

Lord MANSFIELD. On a declaration for a total loss, you may recover an average loss: yet I would not tie the plaintiff down to declare only for a total loss, but leave the plaintiff at liberty to declare both ways. And the latter method is often of service to a defendant, by pointing out the particular average that the plaintiff goes for.

But it is unnecessary to declare double, with respect to the signing of the policy; that is to say, once, as upon a policy signed by the defendant himself; and again, as upon a policy signed by his agent for him. One alone of these two methods of declaring is sufficient;[12] and the better way is to declare according to the truth;[13] that is, upon a policy signed by Silva, as agent for the defendant, duly authorized by him in that behalf.[14]

The rule at last settled by the court was for striking out the three first counts (which alledged the policy to be signed by the defendant himself), but without any payment of costs, as this manner of declaring was said to be usual.

SECTION 4.—COMPLIANCE WITH STATUTE

GREEN v. SEYMOUR.

(Supreme Court of Vermont, 1887. 59 Vt. 459, 12 Atl. 206.)

General assumpsit. Heard on demurrer to the plaintiff's replication to the plea of the statute of limitations, April term, 1886, Royce, C. J., presiding. Judgment sustaining the demurrer and adjudging the replication insufficient. Plea that the causes of action did not accrue within six years, etc.

Replication: "For replication, etc., because they say that prior to the commencement of this suit, to wit, on the first day of August, 1881, it was mutually agreed and understood by and between the said plaintiffs and the said defendant, for sufficient consideration then and there stated and expressed between them; that is to say, the defendant then and there agreed to and with the plaintiffs that, in consideration that the said plaintiffs would cause the said plaintiff E. G. Green and one S. C. Green, then a partner with said E. G. Green, to pay to the said defendant a certain sum or balance in money, to wit, 300 dollars, in full settlement of all accounts between the said defendant and the said E. G. and S. C. Green, as such partners (which said set-

[12] Meers v. Stevens, 106 Ill. 549 (1883); Regents of University of Michigan v. Detroit Young Men's Society, 12 Mich. 138 (1863); Black Lick Lumber Co. v. Camp Construction Co., 63 W. Va. 477, 60 S. E. 409 (1908). Accord.

[13] Childress v. Emory, 8 Wheat. 642, 5 L. Ed. 705 (1823). Accord.

[14] An allegation that the person acting as agent was duly authorized thereto is sufficient. Duval Investment Co. v. Stockton, 54 Fla. 296, 45 South. 497 (1907). See, also, cases cited in 16 Encyc. Pl. & Pr. 901, note 1.

tlement and the terms thereof are in writing, and are hereby referred to, and are not herein set forth to avoid prolixity), that he, the said defendant, would take no advantage of the statute of limitations in the final settlement of the said several causes of action in the said declaration mentioned, and each and every one of them; and in consideration of the said promise of the said defendant, then and there made as aforesaid, they, the said plaintiffs, caused the said E. G. and S. C. Green to pay to the said defendant said sum of money, to wit, 300 dollars, in settlement of all accounts between the said defendant and the said E. G. and S. C. Green, as such partners as aforesaid," etc.

Ross, J.[15] The demurrer to the replication raises but two questions in regard to its sufficiency—First, whether a sufficient consideration for the defendant's agreement to waive the statute of limitations is set forth; and, secondly, whether it is necessary to allege that such agreement is in writing, signed by the defendant. * * *

To be effective to remove the statute of limitations, such agreement or promise must be in writing, signed by the party to be affected thereby. R. L. § 974. In this respect the statute is analogous to the statute of frauds, which declares that no action shall be maintained on certain promises, contracts, and agreements unless in writing, signed by a party to be charged. At the common law the agreements or promises named in both statutes were binding, although unwritten and unsigned. These statutes provide that, to be operative to bind the party making them, the promises and agreements named must be evidenced by a written instrument signed by the party to be affected. The general rule in regard to alleging in pleading matters affected by such statutes is well stated in 4 Bac. Abr. 655, as follows: "If a statute makes certain circumstances necessary to the validity of an act, which was valid at the common law without such circumstances, this does not alter the manner of pleading which was used before the making of the statute" [16]—instancing that 29 Car. 2, c. 3, required a tenant for years to assign his term in writing, but that such assignment, being good by parol at the common law, may be pleaded without alleging it to be in writing. In 1 Chit. Pl. 304, it is said: "The nature of the promise still remains the same in the eye of the law, which does not admit of any distinction between verbal and written agreements, except where the latter are under seal; and it should seem that the provisions of the statute only affects the rules of evidence, and not those of pleading." Yet, on page 534, the same author says: "Thus, in a declaration on a promise to pay the debt of anoth-

[15] A portion of the opinion is omitted.

[16] "The rule is that, where a thing is originally authorized by statute which could not be done at common law, then, in pleading, everything must be averred which the statute requires to bring the act done within it. Thus, in the case of a will of lands, it must be averred to be in writing." Dayton v. Williams, 2 Doug. (Mich.) 31, 32 (1845). See, also, Summerman v. Knowles, 33 N. J. Law, 202 (1868); Walker v. Richards, 39 N. H. 259, 267 (1859); Bayard v. Smith, 17 Wend. (N. Y.) 88 (1837).

er, in consideration of forbearance, it is not necessary to show that the promise was in writing, according to the statute of frauds, but it is said to be otherwise in a plea." In a note a quære is suggested, and Peacock v. Purvis, 2 Brod. & B. 362, is cited. All the authorities, so far as observed, agree that in a declaration it is not necessary to allege that such agreements are in writing;[17] and it has been so held by this court in Hotchkiss v. Ladd, 36 Vt. 593, 86 Am. Dec. 679.

The only case I have found for the statement by Mr. Chitty, "but it is said to be otherwise in a plea," is Case v. Barber, T. Raym. 450.[18] The action was assumpsit, and the defendant pleaded that the cause of action had been adjusted and settled, in part, by an agreement between the plaintiff, defendant, and defendant's son, by which the son agreed to pay a certain portion of the debt at a future day, and that the son had offered to pay the same, but the plaintiff refused to receive it. To this plea the plaintiff demurred; the case does not say whether generally or specially. The plea was held bad—First, because no consideration for the son's promise was alleged; and, secondly, because it was not alleged that the son's promise was in writing; the court holding that unless the son's agreement was in writing, the plaintiff could have no remedy thereon; "and though upon such an agreement the plaintiff need not set forth the agreement to be in writing, yet when the defendant pleads such an agreement in bar, he must plead it so it may appear to the court that an action will lie upon it; for he shall not take away the plaintiff's present action, and not give him another upon the agreement pleaded." In regard to this case, in a note to Steph. Pl. *376, it is said: "It is to be observed that the plea was at all events a bad one in reference to the first objection. The case is, perhaps, therefore, not decisive as to the validity of the record." In Peacock v. Purvis, 2 Brod. & B. 362, on which the quære is raised in the note to Chitty, the defendant pleaded, among other things, a sale of the property on a fieri facias by agreement, without alleging that the agreement was in writing, as required by statute. The plaintiff demurred to the plea. There was another question whether the substance of the plea was a defense. The court do not allude to the fact that the agreement was not alleged to have been in writing, but assume that the plea was good in that respect, and discuss at length the other question, and hold the plea bad in substance. Generally, the same degree of certainty is required in a replication as is required in a plea. While in the text both Mr. Chitty and Mr. Stephens, by a qualified expression, state that while it is not necessary, in a declaration, to allege that such an agreement or promise is

[17] Whitehead v. Burgess, 61 N. J. Law, 75, 38 Atl. 802 (1897), and numerous cases cited in 9 Encyc. Pl. & Pr. 700. Accord. For the few cases contra, see 9 Encyc. Pl. & Pr. 701, 702.

[18] See, also, Duncan v. Clements, 17 Ark. 279 (1856); Dayton v. Williams, 2 Doug. (Mich.) 31 (1845); Dewey v. Hoag, 15 Barb. (N. Y.) 365, 368 (1853); Duppa v. Mayo, 1 Wm. Saund. 276e, note 2 (1670). (In the official report the citation of Case v. Barber is given as L. Raym. 450, instead of T. Raym. 450).

in writing, where the writing is only required to evidence the agreement or promise, and not to make the agreement or promise legally binding, yet, in the note on the text, doubt is suggested in regard to the doctrine of the text, and the case in 2 Brod. & B., supra, seems to have disregarded the decision in Ld. Raym., from which the doctrine of the text seems to have been taken.

Whatever may be said in regard to a plea, it is not apparent, on principle, why an allegation which would, confessedly, on both principle and authority, be sufficient in a declaration, should not also be sufficient in a replication. In this state of the common-law authorities it can hardly be said to be established that such an allegation is necessary in a plea. All the text-book writers fully recognize the general doctrine as stated by Mr. Stephens, *374: "With respect to acts valid at common-law, but regulated as to the mode of performance by statute, it is sufficient to use such certainty of allegations as was sufficient before the statute."

This general doctrine is applicable to the replication, so far as it is wanting in allegation, that the defendant's agreement to waive the benefit of the statute of limitations was in writing, and seems to have been adopted by this court as applicable to a plea in Carpenter v. McClure, 37 Vt. 127. If a remark by Redfield, C. J., in Patrick v. Adams, 29 Vt. 376, looks like a recognition of the contrary doctrine, it is to be observed that it was hardly required for the decision then made, and appears to have been made without examination. There is no valid reason why one rule should be applicable to a declaration and another to a plea or replication. A plaintiff ought not to be allowed to call a defendant into court and compel him to answer matter in a declaration as sufficient in law, which he would not be legally bound to reply to if interposed against him by plea; nor can any good reason be assigned why the defendant should be held to answer matter as legally sufficient in a declaration which would be insufficient in a replication. In either case he may answer that the alleged agreement is not in writing, or may traverse and object to the evidence if not in writing. We think the general doctrine applicable to the replication under consideration, and that if the defendant would conclude the plaintiff on the pleadings, rather than object to the proof of the agreement by parol on a traverse of the replication, he should have rejoined that the alleged agreement was not in writing.

The judgment is reversed, the demurrer overruled, the replication adjudged sufficient, and the cause remanded.

SECTION 5.—CONSTRUCTION OF PLEADINGS

TOWN OF CAMERON v. HICKS.

(Supreme Court of Appeals of West Virginia, 1909. 65 W. Va. 484, 64 S. E. 832, 17 Ann. Cas. 926.)

Action by the Town of Cameron against John A. Hicks, as administrator of the estate of C. Y. Benedum, deceased. Judgment for plaintiff, and defendant brings error. Affirmed.

POFFENBARGER, J.[19] The town of Cameron recovered a judgment against John A. Hicks, as administrator of the estate of C. Y. Benedum, for the sum of $3,484.77, in an action of debt in the circuit court of Marshall county, on a submission thereof to the court in lieu of a jury.

The overruling of the demurrer to the declaration, rejection of a certain plea, and the finding on the evidence are the subjects of complaint. The grounds of demurrer are: (1) The charge is that the defendant owes, not that he detains or owes and detains. (2) The allegation, respecting the making and service of an order, requiring the decedent to pay over the money, are insufficient.

Tested by the facts, the declaration sets forth liability in a representative capacity only. According to these, the town issued and sold its bonds for sewerage purposes, and placed the proceeds thereof in the hands of T. C. Pipes, Clell Nichols, and A. E. Fox, whom it had appointed its bond commissioners. Benedum, the decedent, became surety on the bond of Fox in the penalty of $4,000, the condition whereof was that Fox should faithfully perform the duties of bond commissioner and account for and pay over all money that should come into his hands by virtue of his office. Some of the counts say he received, as such commissioner, $3,300, and others that he, Pipes and Nichols, as such, received $10,000, and charge, as a breach of the condition, the nonpayment by Fox of $3,255.56, part thereof, after demand therefor. There is no suggestion of a devistavit, and the charge is that the defendant owes the money as administrator. It therefore imports an obligation in that capacity, and no other, to pay it. Strictly and technically speaking, he detains the money. The word "owes," standing alone, would have a broader meaning, but it must be read in connection with other parts of the declaration. Its true meaning, as used in that instrument, is determined, not by its form or signification in the abstract, but by the context. In their general nature the rules of construction applicable to pleadings are not materially different from those pertaining to other documents or writings. It is

[19] A portion of the opinion is omitted.

true everything must be taken most strongly against the party pleading,[20] but this maxim is operative only when two meanings present themselves. If, on a fair and reasonable interpretation of the words used, no ambiguity appears, it has no application. 1 Chitty on Pleading (11th Ed.) 237, says: "But, in applying this maxim, the other rules must be kept in view, and particularly those relating to the degree of certainty or precision required in pleading. The maxim must be received with this qualification: That the language of the pleading is to have a reasonable intendment and construction; and, where an expression is capable of different meanings, that shall be taken which will support the declaration, etc., and not the other, which would defeat it. * * * But, if it be clearly capable of different meanings, it does not appear to clash with any rule of construction, applied even to criminal proceedings, to construe it in that sense, in which the party framing the charge must be understood to have used it, if he intended that his charge should be consistent with itself. * * * And if, where the sense may be ambiguous, it is sufficiently marked by the context or other means in what sense they were intended to be used, no objection can be made on the ground of repugnancy, which only exists where a sense is annexed to words which is either absolutely inconsistent therewith, or, being apparently so, is not accompanied by anything to explain or define them. If the case be clear, nice exceptions ought not to be regarded." We applied this principle in Ceranto v. Trimboli, 63 W. Va. 340, 60 S. E. 138. From what has been said it must be apparent that the use of the word "owes" and the omission of the word "detains" constitute nothing more than a formal defect, if, indeed, any at all. It amounts to a departure from the customary form of allegation, an immaterial matter, if the declaration is sufficient in substance and certain to a "certain intent in general." * * *

Affirmed.

SECTION 6.—THEORY OF PLEADING

CHARNLEY v. WINSTANLEY.

(Court of King's Bench, 1804. 5 East, 266.)

The plaintiff declared in covenant, that by indenture under seal dated 7th of December, 1793, between the plaintiff of the first part, the defendant Frances, by her then name of Frances Brown, spinster, ad-

[20] For full discussion of cases announcing this rule, see concurring opinion of Shackleford, C. J., in Atlantic, etc., Co. v. Benedict, etc., Co., 52 Fla. 165, 173, 42 South. 529, 530 (1906).

Where the pleading is not attacked on demurrer, the pleading is to be construed liberally so as to support the verdict or judgment. See Kelleher v. Chicago City Railway Co., 256 Ill. 454, 456, 100 N. E. 145 (1912).

ministratrix of John Brown, of the second part, and W. R., on the third part, the plaintiff and the said Frances agreed to leave to W. R. to collect certain debts of the late partnership between the plaintiff and the defendant's intestate, and to settle all differences, by leaving to W. R. the adjustment and final settlement of such accounts: they therefore conveyed all the debts and effects of the partnership to W. R. the arbitrator. And the plaintiff and the said Frances covenanted with each other, that they would well and truly obey, abide and perform the award of W. R. in the premises, provided the award should be made during the natural lives of the plaintiff and the said Frances. The plaintiff then stated that, though he had performed his part of the indenture, yet protesting that the defendant Frances before her intermarriage did not observe and perform, etc., and that the defendants since their intermarriage have not observed, performed or fulfilled any thing in the said indenture contained on the part of the said Frances; he averred that, after the making of the said indenture and the intermarriage of the defendants, and during the joint lives of him, the plaintiff, and the said Frances, viz. on the 22d of July, 1803, W. R. duly made his award concerning the premises, and awarded the said Frances to pay to the plaintiff a certain sum on the 10th of August then next; of all which premises the defendants had notice, etc. The plaintiff then alleged, as a breach, that the defendants did not on the said 10th of August, and after making the award, pay the sum awarded; contrary to the said indenture and the covenant of the said Frances; and so the plaintiff says, that the defendants have not, nor hath either of them kept with him the covenant of the said Frances, although requested, etc. To this the defendants pleaded non est factum; and after verdict for the plaintiff it was moved in arrest of judgment that the marriage of the defendant Frances after entering into the covenant to submit to arbitration, and before any award made, was a revocation of the arbitrator's authority, and consequently there could be no breach of an award which he had no authority to make.

Lord Ellenborough, C. J. If this had come upon a special demurrer as for a defective allegation of the breach of covenant by marrying, there would have been good ground for the defendant's objection to the manner of declaring; for here the breach of covenant arising out of the facts shewn by the declaration is the fact of the defendant's intermarriage before any award made, by which the defendant Frances incapacitated the arbitrator from making any award to bind her, and thereby broke her covenant to abide the award of the arbitrator. But the plaintiff not relying on this, proceeds to shew by way of breach that the defendant Frances did not pay the money awarded after such intermarriage. But notwithstanding the plaintiff has stated his real gravamen informally, yet if upon the whole it appear that the defendant Frances has committed a breach of covenant, the judgment cannot be arrested. Now here the plaintiff, protesting

that the defendant Frances did not before her intermarriage observe her part of the indenture, avers that after the making of the indenture, and the intermarriage of the defendants, the arbitrator made his award. That is a sufficient allegation of the fact of the marriage being before the award, which constitutes a breach of the covenant, to warrant us in giving judgment for the plaintiff on that ground. And this upon the principle, which we had occasion to consider very fully in a late case, that however defective the pleadings, and however imperfect the prayer of judgment on either side may be, we are bound ex officio to give such a judgment as upon the whole record the law requires us to do.[21]

Rule discharged.[22]

SECTION 7.—ALLEGATIONS OF EVIDENCE

COX v. PROVIDENCE GAS CO.

(Supreme Court of Rhode Island, 1891. 17 R. I. 199, 21 Atl. 344.)

Trespass on the case. On demurrers to the declaration.

DURFEE, C. J. This is case for damages for injuries received by the plaintiff, an employé of the defendant company, while at work as such at the company's gasworks, in consequence of an explosion in or from a tank or receptacle excavated in the ground near where he was at

[21] The concurring opinions of Grose, J., Lawrence, J., and Le Blanc, J., are omitted.

[22] "It appears by the plea that the defendant, by countermanding the authority of the arbitrators, has broken the covenant to abide by the award, or that whereby he stipulated not to hinder the arbitrators from making an award; and it is urged on the part of the plaintiff that, although this plea is an answer to the cause of action suggested in this count, yet that, inasmuch as it appears upon the whole record that the defendant has been guilty of a breach of covenant, the plaintiff is entitled to judgment upon that count, and the case of Charnley v. Winstanley, 5 East, 266 (1804), has been relied upon. That case, however, is very distinguishable from the present. There it appeared upon the face of the plaintiff's count that the award was made after one of the parties to the submission had become a feme covert. Her marriage was in itself a revocation of the authority of the arbitrators, and therefore was a breach of the covenant to abide by the award. In this case, the breach of that covenant is disclosed only by the defendant's plea, and it has never been held that a plaintiff who seeks to recover damages for one ground of action stated in his count is entitled to recover in respect of another disclosed by the defendant's plea. I am of opinion that a plaintiff can recover only in respect of the ground of action stated in his declaration." Abbott, C. J., in Marsh v. Bulteel, 5 B. & Ald. 507 (1822). See, also, Head v. Baldrey, 6 A. & E. 459 (1837); Le Bret v. Papillon, 4 East, 502 (1804); East, etc., Ry. Co. v. Reames, 75 Ill. App. 28 (1897); Guianios v. De Camp Coal Mining Co., 242 Ill. 278, 89 N. E. 1003 (1909). Cf. Meyers v. McQueen, 85 Mich. 156, 160, 48 N. W. 553 (1891).

work. The declaration contains three counts.[23] * * * The third count sets forth the circumstances of the explosion and the consequent injury substantially as they are set forth in the second count, but it contains no allegation of negligence on the part of the company. It may be that a jury, on proof of the facts alleged, would infer that the explosion occurred in consequence of the company's negligence, in the absence of any counter testimony, but nevertheless the company's negligence is a fact to be proved by the plaintiff, either directly or inferentially, in order to recover; it being, indeed, the very gist of the action, and, as such, it must be alleged, or appear by legal intendment from what is alleged. The demurrer to the third count is therefore sustained.

Demurrers to first and second counts overruled after amendments of such counts as above indicated. Demurrer to third count sustained.[24]

NORTH v. KIZER.

(Supreme Court of Illinois, 1874. 72 Ill. 172.)

SHELDON, J.[25] This was an action of assumpsit, brought by Kizer & Fullenwider, as partners, against North, to recover damages for the alleged breach of the following contract in writing, by not accepting and paying for the hogs therein mentioned, to wit:

"March 21, 1871.

"I have this day sold B. H. North three hundred fat, merchantable hogs, to average two hundred and fifty pounds gross and upwards, to be delivered at Buffalo Station, Illinois, between the 15th of July and the 15th of August next, at the option of the buyer, buyer to give seller eight days' notice when to deliver. The buyer agrees to pay seven dollars per hundred pounds gross. Said hogs are the hogs I bought of Dunnick.

P. H. Kizer.

"B. H. North."

[23] The portion of the opinion dealing with the sufficiency of the first and second counts is omitted.

[24] Bedell v. Stevens, 28 N. H. 118, 124 (1853), accord. Cf. Spencer v. Southwick, 9 Johns. (N. Y.) 314 (1812); Winheim v. Field, 107 Ill. App. 145, 151 (1903).

"This latter contention [i. e., that the declaration alleged evidentiary and not ultimate facts] is no doubt true, but as the evidentiary facts alleged are sufficient, if true, to establish conclusively the ultimate facts, the defect in this respect is one of form, and not one of substance. If the evidentiary facts alleged were insufficient in law to establish the ultimate facts, the defect would be one of substance, proper to be reached by general demurrer, but if the objection be simply to this manner of pleading the ultimate facts, the defect is one of form, and could formerly be reached by special demurrer only." Camp & Bros. v. Hall, 39 Fla. 535, 568, 22 South. 792, 796 (1897).

[25] A portion of the opinion of Sheldon, J., and the dissenting opinion of McAllister, J., are omitted.

The declaration averred that the plaintiffs were partners in the contract; that they were always ready, between the 15th of July and the 15th of August, to deliver the hogs; that the defendant failed to give any notice when to deliver the hogs, and that on the 15th day of August, 1871, the plaintiffs, at the place designated, did tender and offer to deliver to the defendant the hogs, which the latter failed to accept and pay for.

The declaration contained seven counts, all upon the above contract. A demurrer to the declaration, which was made several to each count, was overruled, and, the defendant standing by his demurrer, a jury was thereupon called, and the plaintiffs' damages were assessed before the court, by a jury, at $2,858.51, for which judgment was rendered. The defendant appeals. * * *

This [the fifth] count sets out the contract in hæc verba, and then alleges the subsequent agreement to extend the time of performance so as to include the 15th day of August, the tender of delivery on that day, and the breach in not accepting and paying for the hogs, without setting forth, in express words, a promise to accept and pay for the hogs, or a consideration for the promise, and it is insisted that the count is defective in this last particular.

There are two well-recognized modes of declaring upon a written contract, either by setting it out in hæc verba, or according to its legal effect. When the former mode is adopted, as in this case, the court will construe the contract for the pleader, and recognize what is its legal effect. This written contract, upon its face, imports a promise by the defendant, upon a sufficient consideration, to accept and pay for the hogs upon performance on his part by the seller—such is its legal effect.[26]

After setting out the contract in its very words, to declare further what is its legal effect, would seem to be superfluous—it would be averring what already appears.[27]

Authority may be found to the effect that a declaration in assumpsit which does not contain the word "promised" may, nevertheless, be good, provided it sufficiently appears, from the whole declaration, that what is equivalent to a promise has taken place. 1 Chit. Pl. 301.

[26] Pleading according to legal effect. Gaddy v. McCleave, 59 Ill. 182 (1871); Stultz v. Locke, 47 Md. 562 (1878); Hovey v. Smith, 22 Mich. 170 (1871); Starcher v. Hope Natural Gas Co., 72 W. Va. 167, 77 S. E. 900 (1913).

[27] "The first count * * * adopts very nearly the words of the contract itself. This is sometimes sufficient and sometimes not. That depends on the degree of precision and certainty with which the contract is drawn. * * * But in regard to a declaration, it should be certain to a common intent, and where the contract is not so it becomes the duty of the pleader intelligibly to express that view of the contract upon which the plaintiff's claim is founded." Town of Royalton v. Royalton, etc., Co., 14 Vt. 311, 321 (1842).

Some cases hold that an essential averment cannot be supplied by the writing set forth in hæc verba. See Bean v. Ayers, 67 Me. 482 (1878); Brown v. Starbird, 98 Me. 292, 56 Atl. 902 (1903); Cooke v. Simms, 2 Call (Va.) 39 (1799); Wheeling, etc., Co. v. Wheeling, etc., Co., 62 W. Va. 288, 292, 57 S. E. 826 (1907), semble.

A promise and consideration have been at least substantively set forth, and we must regard the count as sufficient in this respect, on general demurrer. * * *

Judgment affirmed.

SECTION 8.—CONCLUSIONS FROM EVIDENCE

STANDIFORD v. GOUDY.

(Supreme Court of Appeals of West Virginia, 1873. 6 W. Va. 364.)

HOFFMAN, J. This is an action of trespass on the case, the declaration in which contains two counts.

[The court held the first count good.]

The second count alleges that one Woods was the owner in fee simple of two coterminous tracts of land, the first and second, separately bounded as specified; that Woods, by deed, conveyed the first of the tracts to one Sharnock in fee simple, and he, by deed, conveyed the same to the plaintiff in fee simple; that by virtue of these deeds Sharnock took, and from him the plaintiff took, a way appendant to the first tract, at and before the deed from Woods to Sharnock, which way runs and did then commence and run from that tract, through and over the second tract, to a public highway, described; and that, till the time of the committing of the grievance therein mentioned, the plaintiff was, and thence hitherto has been and still is, lawfully possessed of the first tract, and, by reason thereof, the plaintiff, during the time mentioned, ought to have had, and still of right ought to have and did have, until the happening of the grievance mentioned, the way, described as in the former count. Yet, etc., as in that count.

This count purports to state, not merely that the plaintiff had a right of way, such as is referred to, but to set forth the facts that constitute his title. It indicates, negatively, that if these facts do not make his right, he has none.

It is said that prescription requires a continued enjoyment of an incorporeal hereditament, for a time without memory to the contrary, and that such prescription cannot exist in this or any other state in the Union. And it is stated that a right of way is appendant only when it is prescriptive. But it is generally asserted—and I believe not controverted—that the presumption of a pre-existing grant, under which the way has been used, is the foundation of the prescription. For this reason principles of pleading applicable to contracts are applied to prescription, though prescription is not pleaded as a contract. And the use of a way, with claim of right, for a period long enough to bar an action for the recovery of land, creates the presumption of a

grant, which is sometimes called prescription. I do not perceive that these classes of rights differ in their origin or character, though they may vary as to duration of the enjoyment that evinces, and perhaps as to the conclusiveness of the presumption that secures them. Nor do I perceive that a right incident to one tract of land, to a way through another, is any more or less appendant or appurtenant, because it is secured by prescription founded in immemorial enjoyment, or the presumption of a grant from enjoyment continued for a limited period, or the implication of a grant from necessity, in order to the enjoyment of land conveyed, or an express grant or creation of right. But, as the word "appendant" has been used in the restricted sense already mentioned, while the word "appurtenant" has not been so limited in its employment, the latter may be preferable in pleading as well as in conveyancing.

The count in question, however, indirectly alleges or indicates that, while Woods owned the two adjoining tracts of land, he had, appendant to the one, a way over the other. This is a contradiction. The absolute owner of both tracts cannot have an easement over the one appendant or appurtenant to the other.

When the owner of two tracts of land has used a way to and from one, over the other, no matter how long, and he grants the former tract without mention of any way, unless the way is necessary to the enjoyment of the tract granted, the mere grant of the land does not create or confer a way appendant, appurtenant, or in gross.

The statute, declaring that a deed, unless an exception be contained in it, shall be construed to include appurtenances, does not apply to the creation of easements, but to the transfer of those already existing.

The count does not allege any necessity for a way over the tract retained, in order to the enjoyment of the tract granted, or any fact that would imply the grant of such a way. Nor does it indicate that there was an express grant of a way. The count is therefore bad.[28]

The defendant demurred to the declaration, but not to each count; and the court sustained the demurrer.

As the demurrer was to the whole declaration, one count of which was good, and was not to each count, the demurrer should have been overruled.

The judgment of the Circuit Court is reversed, the demurrer overruled, costs awarded the appellant, and the cause remanded for further proceedings according to law.

HAYMOND, President, PAULL and MOORE, Judges, concur in the foregoing opinion.

[28] Lockart v. Roberts, 3 Bibb (Ky.) 361, 363 (1814). Accord. See Williams' Saunders, 23, note 5, and 23a, note m.

Where the specific facts alleged are inconsistent with a general averment or conclusion, the former control. Baumler v. Narragansett Brewing Co., 23 R. I. 430, 433, 50 Atl. 841 (1901); Catlin v. Glover, 4 Tex. 151 (1849); Sun Life Assurance Co. v. Bailey, 101 Va. 443, 44 S. E. 692 (1903).

SECTION 9.—ALLEGATIONS OF LAW

SEYMOUR v. MADDOX.

(Court of Queen's Bench, 1851. 16 Q. B. 326.)

Case. The declaration stated: That the defendant was possessed of a certain theatre, to wit, the Princess's Theatre, etc., and of a certain stage therein, on which operas and other dramatic entertainments were performed, and of a certain dressing room therein, known as the dressing room of the male chorus singers, and of a certain floor therein underneath the said stage, called the Mazarine Floor, in which floor was a certain cut or hole of great depth, etc., across and along which said floor persons performing at and in the theatre, in operas and other dramatic entertainments, were accustomed, before, during, and after the performance thereof, to pass from and to said dressing room to and from the back of the stage. That defendant had hired plaintiff to act, sing, and perform as a chorus singer at the theatre on the said stage, for reward in that behalf. That plaintiff, on the 31st May, 1848, did act, sing and perform at the said theatre on the stage under such hiring as aforesaid, in a certain opera called the Crown Diamonds, which opera was then and there performed under the management of and for the profit of the defendant. That it then became and was the duty of the defendant to cause the said Mazarine Floor to be so sufficiently lighted, and the said cut or hole to be so fenced, guarded or secured, before, during, and until after the lapse of a reasonable time from the termination of, the said performance, as to prevent any accident or injury to persons passing across and along the Mazarine Floor from and to the dressing room to and from the back of the stage. That the defendant, well knowing the premises, suffered and permitted the Mazarine Floor to be insufficiently lighted, and the cut or hole to be open without any sufficient fence, guard or security, before, during, and until after the lapse of a reasonable time from the termination of, the performance, by reason of which insufficient lighting as aforesaid, and of the cut or hole being so as aforesaid open without any sufficient fence, guard or security, the plaintiff, who was then, within a reasonable time from, to wit, immediately after, the termination of the performance, passing from the back of the stage across and along the Mazarine Floor to the dressing room, fell into and down the cut or hole, and thereby was then grievously bruised and injured, etc.

Pleas, among others, not guilty, and a traverse of the alleged duty. Issues thereon.

On the trial, before Erle, J., at the Middlesex sittings after last Trinity term, the verdict was for the plaintiff.

Chambers, in last Michaelmas term, obtained a rule nisi to arrest the judgment, on the ground that the declaration shewed no such duty to light and fence the hole as alleged.

Lord CAMPBELL, C. J.[29] I am of opinion that judgment in this case must be arrested. The duty, a breach of which is laid, does not arise from the particular facts stated in the declaration nor from the general relation of master and servant. What, then, is the effect of the positive allegation of such duty? I confess that I, at first, thought that, where a relation from which a particular duty may arise is alleged, and the particular duty is also alleged, it might be shewn in evidence that, in fact, such a duty did arise, and that it was unnecessary to set forth the facts themselves which raise the duty. But the decisions shew that the allegation of duty is in all cases immaterial, and ought never to be introduced; for, if the particular facts raise the duty, the allegation is unnecessary, and, if they do not, it will be unavailing. In this case there is an allegation that it was the defendant's duty to light the floor and fence the hole, but no facts are stated from which the duty arises. The express allegation, therefore, will not help the defect, and the declaration is bad.

PATTESON, J. It has been determined that it is not necessary to allege the duty where it arises from the particular facts stated in the declaration: and the question now is, virtually, whether, if facts are stated which do not raise the duty, you may prove it by other facts than those stated. If you may not so prove it, then we must look at the particular facts which are stated in the declaration and at those only, and cannot treat the declaration as aided by a verdict founded on any other facts. The allegation of duty is a mere inference of law, and cannot be traversed: therefore the declaration must stand or fall by the facts stated, and cannot be helped by the unnecessary allegation of duty. And, as in this case the breach is of a duty which does not arise from the mere contract or relation between the parties, nor from the facts stated, I am of the opinion that the declaration is bad.

Rule absolute.[30]

[29] The concurring opinions of Coleridge, J., and Erle, J., are omitted.

[30] Milligan et al. v. Keyser et al., 52 Fla. 331, 42 South. 367 (1906); Schueler v. Mueller, 193 Ill. 402, 61 N. E. 1044 (1901); Barlow v. Burns, 70 N. J. Law, 631, 57 Atl. 262 (1904); King v. Interstate, etc., Co., 23 R. I. 583, 51 Atl. 301, 70 L. R. A. 924 (1902). Accord. Cf. Flint, etc., Co. v. Stark, 38 Mich. 714 (1878). For numerous illustrations of averments held to be allegations of law, see 31 Cyc. 52 et seq.

In pleading judgments it was early settled that it was not necessary to set forth all the proceedings in the court rendering the judgment. Murray v. Wilson, 1 Wils. 316 (1752). As to method of pleading judgments, see Sheldon v. Hopkins, 383, supra, and notes thereto; 11 Encyc. Pl. & Pr. 1125 et seq.

DAY v. CHISM.

(Supreme Court of the United States, 1825. 10 Wheat. 449, 6 L. Ed. 363.)

Error to the circuit court of the United States for Tennessee.

MARSHALL, C. J. This is an action of covenant brought by the heirs and devisees of Nathaniel Day, in the court for the seventh circuit, for the district of Tennessee, on a covenant contained in a deed from the defendant to the said Nathaniel Day, purporting to convey a tract of land therein mentioned. The declaration, which contains six counts, states the covenant in the fourth, in the following words: That the said Obadiah Chism, the defendant, "then and there, by the said indenture, covenanted and agreed with the said Nathaniel Day, his heirs and assigns, to warrant and defend the title to the said premises against the claim of all and every other person whatsoever, as his own proper right in fee-simple." In the fifth count the covenant alleged is "to warrant and defend the land against all and every person whatever."

In some of the counts the only breach assigned is want of title in the defendant. The fourth and fifth counts charge that "the said Obadiah, the defendant, hath not kept and performed his covenant so made with the said Nathaniel aforesaid, with the said Nathaniel in his lifetime, nor with the plaintiffs since his death, but hath broken it in this, that he hath not warranted and defended the title to said premises, described in said covenant, against all and every person whatsoever, to said Nathaniel Day, his heirs and assigns; and also in this, that the said Obadiah had no title to said tract of land, but it was vested in the state of Tennessee; and the said plaintiffs aver that, by reason of said want of title in said Obadiah, the said Nathaniel, in his lifetime, and the plaintiffs since his death, were unable to obtain possession thereof, or to derive any benefit therefrom; and also in this, that the said Obadiah had not a good and sufficient title to the said tract of land, and by reason thereof the said plaintiffs were ousted and dispossessed of the said premises by due course of law; and also in this, that the said Obadiah had no title to the said premises, but the same was in the state of North Carolina, by reason whereof the said Nathaniel, in his lifetime, and the plaintiffs since his death, were and are unable to obtain possession of the said premises."

The defendant demurred to the declaration, and assigned for cause of demurrer, that (1) "It does not appear in and by the said declaration, any averment or allegation therein, that the said plaintiffs have been evicted by a title paramount to the title of the defendant; and (2) the said declaration is, in other respects, defective, uncertain, and informal."

The covenant stated in the declaration is, we think, a covenant of warranty, and not a covenant of seisin, or that the vendor has title. In an action on such a covenant, it is undoubtedly necessary to al-

lege, substantially, an eviction by title paramount, but we do not think that any formal words are prescribed, in which this allegation is to be made. It is not necessary to say in terms, that the plaintiff has been evicted by a title paramount to that of the defendants. In this case, we think such an eviction is averred substantially. The plaintiffs aver "that the said Obadiah had not a good and sufficient title to the said tract of land; and by reason thereof the said plaintiffs were ousted and dispossessed of the said premises by due course of law." This averment, we think, contains all the facts which constitute an eviction by title paramount. The person who, from want of title, is dispossessed and ousted by due course of law, must, we think, be evicted by title paramount.[31]

We think, then, that the special cause assigned for the demurrer will not sustain it.

There are other defects in the declaration, which are supposed by the counsel for the defendants in error to be sufficient to support the judgment. The plaintiffs claim both as heirs and devisees, and do not show in particular how they are heirs, nor do they set out the will.

It is undoubtedly true that their title cannot be in both characters, and that the will, if it passes the estate differently from what it would pass at law, defeats their title as heirs. But a man may devise lands to his heirs, and the statement that they are his heirs, as well as his devisees, though not a strictly artificial mode of declaring, is an error of form and not of substance. Of the same character is, we think, the omission to state how the plaintiffs are heirs, or to set out the will. Although, in the case of Denham v. Stephenson, 1 Salk. 355, 6 Mod. 241, the court says "that, where H. sues as heir, he must show his pedigree, and coment heres, for it lies in his proper knowledge," the court does not say that the omission to do this would be fatal on a general demurrer, or that it is an error in substance.[32] The plaintiff must show how he is heir on the trial; and the 32d section of the Judiciary Act of Sept. 24, 1789, c. 20, 1 Stat. 91 (Comp. St. 1913, § 1591), applies, we think, to omissions of this description. The judgment may be given "according to the right of the cause, and matter in law," although the declaration may not show whether the plaintiff is the son or brother of his ancestor, or may not set out the will at large.

[31] Practically the same allegation was upheld in Hershiser v. Ward, 29 Nev. 228, 241, 87 Pac. 171 (1906; Code), without citation of authority.

[32] Heard v. Baskervile, Hobart 232 (1615). Accord. Treasurer v. Hall, 3 Ohio, 225 (1827). Contra.

Where the defendant is sued as heir, it is not necessary for plaintiff to show defendant's pedigree. Denham v. Stephenson, 1 Salk. 355 (1705); Waller's Executors v. Ellis, 2 Munf. (Va.) 88, 95 (1810).

A general allegation of ownership is sufficient. Bucki v. Cone, 25 Fla. 1, 17, 6 South. 160 (1889); Bragg v. Chicago, 73 Ill. 152 (1874); Jordan v. Record, 70 Me. 529 (1879); Wright v. Williams, 5 Cow. (N. Y.) 338 (1826); Meyer v. Horst, 106 Pa. 552, 557 (1884), semble. But in pleading title under a particular estate the commencement of that estate must be set forth. Johns v. Whitley, 3 Wils. 65 (1770); Wright v. Williams, 5 Cow. (N. Y.) 338 (1826); and cases cited 21 Pl. & Pr. 728.

An averment that he is the heir or the devisee, avers substantially a valid title, which it is incumbent on him to prove at the trial.

The declaration presents another objection, respecting which the court has felt considerable difficulty. In the same count breaches are assigned which are directly repugnant to each other. The plaintiffs allege that, from the defect of title in the vendor, they have not been able to obtain possession of the premises; and also that they have been dispossessed of those premises by due course of law. These averments are in opposition to each other. But the allegation that possession has never been obtained is immaterial, because not a breach of the covenant, and, the majority of the court is disposed to think, may be disregarded on a general demurrer.

It is the opinion of the court that the fourth and fifth counts, however informal, have substance enough in them to be maintained against a general demurrer, and that the judgment must be reversed and the cause remanded for further proceedings. It will be in the power of the circuit court to allow the parties to amend their pleadings.

Judgment reversed accordingly.

SECTION 10.—INCORPORATION BY REFERENCE

MARDIS' ADM'RS v. SHACKLEFORD.

(Supreme Court of Alabama, 1844. 6 Ala. 433.)

This was an action of assumpsit by the defendant in error, against the plaintiffs. The declaration contains eight counts, on the first six of which, issues of fact were joined, and to the seventh and eighth, the defendants demurred seriatim. * * *

The eighth count, instead of describing the evidences of debt placed in the intestate's hands, merely declares that they are identical with those mentioned in the third and seventh counts, and alleges that the money to be collected thereupon, was to be paid to divers creditors of Burke, Shackleford & Co., without designating them in any manner, or stating where their demands were to be found. It avers a breach of the intestate's contract in toto, and as a consequence of his default, that the money due the plaintiff on the evidences of debt was wholly lost to him; and that he has been compelled to pay the demands against B. S. & Co. which the intestate, by his collections, was to have discharged. This count concludes as that which preceded it. The demurrer to each count was sustained, and the cause submitted to a jury upon issues of fact to the entire declaration, who returned a verdict for the plaintiff, for the sum of three thousand and forty-six dollars and seventy-five cents; and judgment was thereupon rendered.

COLLIER, C. J.[33] * * * It is objected to the eighth count, that it does not describe the claims which the intestate received for collection, but merely refers to the third and seventh counts, and adopts the description contained in the third and seventh counts. The several counts of a declaration are regarded as its different parts or sections (Step. on Plead. 267) and in framing it, unnecessary repetition should be avoided. This may be done by the counts referring to each other; but unless such reference is made, one count will not be aided by another; "for though both counts are in the same declaration, yet they are as distinct as if they were in separate declarations; and consequently, they must independently contain all necessary allegations, or the latter count must expressly refer to the former." 1 Saund. on Plead. and Ev. 417. In Rider v. Robbins, 13 Mass. 284, the first count concluded that the defendant, "though often requested has never paid, etc., but neglects and refuses, etc.," but the second contained no such averment or any thing equivalent: Held, that the allegation of the first, might be applied to the second count. And in Dent's Adm'r v. Scott, 3 Har. & J. (Md.) 28, it was considered to be sufficient for one count to set out a consideration, and for the other counts seeking to enforce a contract founded upon the same consideration to refer to it. Each count it was said, need not contain a complete declaration in itself, but by a reference to another, its defects would be supplied. The case of Maupay v. Holley, 3 Ala. 103, is entirely consistent with the authorities cited. That was an action of assumpsit, and the declaration contained two counts, in each of which the contract was stated differently. The court said, "where a declaration contains several counts, each count is considered as the statement of a different cause of action; and where issue is taken upon all, the plaintiff is entitled to recover, upon proving the allegations of either." The citations made are directly in point, and in recognizing them as authoritative, we necessarily attain the conclusion that the objection to the eighth count is not well taken. * * *[34]

[33] The statement of facts is abridged and a portion of the opinion is omitted.

[34] Tindal v. Moore, 2 Wils. 114 (1760); Phillips v. Fielding, 2 H. Bl. 123, 131 (1792) (semble); Florida, etc., Co. v. Foxworth, 41 Fla. 1, 55, 25 South. 338, 79 Am. St. Rep. 149 (1899); Columbian Accident Co. v. Sanford, 50 Ill. App. 424 (1893); Burbank v. Horn, 39 Me. 233, 235 (1855); Hitchcock v. Munger, 15 N. H. 97 (1844); Crookshank v. Gray, 20 Johns. (N. Y.) 344 (1823); Fellows v. Chipman, 26 R. I. 196, 58 Atl. 663 (1904). Accord.

The reference must be definite; mere allusion is not sufficient. Florida, etc., Co. v. Foxworth, 41 Fla. 1, 55, 25 South. 338, 79 Am. St. Rep. 149 (1899); Rose v. Jackson, 40 Mich. 29 (1879); Crawford v. New Jersey, etc., Co., 28 N. J. Law, 479 (1860). If the count to which reference is made fails, the reference also fails. Fraternal Tribunes v. Hanes, 100 Ill. App. 1 (1901); Richardson v. Lanning, 26 N. J. Law, 130 (1856); Nelson v. Swan, 13 Johns. (N. Y.) 483 (1816). Accord. Anniston, etc., Co. v. Elwell, 144 Ala. 317, 42 South. 45 (1905); Cleveland, etc., Co. v. Rice, 48 Ill. App. 51 (1892). Contra.

A separate writing cannot be made a part of a pleading by attaching it thereto or by referring to it therein. Milligan v. Keyser, 52 Fla. 331, 42 South. 367 (1906); Pearsons v. Lee, 1 Scam. (Ill.) 193 (1835); Harlow v. Boswell, 15

SECTION 11.—JUDICIAL NOTICE

PEOPLE ex rel. DIXON v. SHAW.

(Supreme Court of Illinois, 1852. 13 Ill. 581.)

This was a proceeding by information, in the nature of a quo warranto, originally commenced in the Winnebago Circuit Court, and removed to the county of Stephenson by change of venue. * * *

Application for the writ was made and resisted. At the March term, 1850, of the Winnebago Circuit Court, the relator filed his petition and affidavit for a change of venue, alleging that the judge of that court was prejudiced against the relator. After hearing argument, the judge of the Winnebago Circuit Court ordered the venue changed to Stephenson county. The transcript and papers, except the petition for the change of venue, were filed in the Stephenson Circuit Court, at March term, 1850. Application was then made to the Shephenson Circuit Court for leave to file the information; the defendants resisted the application, but the court granted leave to file the information. The writ of subpœna was issued, and returned served. The information was filed at the same term.

At September term, 1851, the defendants entered their appearance, and filed a plea that the Stephenson Circuit Court ought not to take cognizance of, or sustain the proceeding by quo warranto, because the cause of action accrued in the county of Winnebago, and within the jurisdiction of the Circuit Court of that county, and not within the jurisdiction of the Stephenson County Circuit Court.

To this plea the relator filed a general demurrer. After a hearing upon the demurrer, it was overruled, and the court declined to proceed further for want of jurisdiction. Judgment was given against the relator for costs.

The counsel for the relator then moved the court to remand the cause to Winnebago county, which motion was overruled. The counsel for the people excepted, and brought the case to this court, by writ of error, for review.

CATON, J.[35] The demurrer to the plea to the jurisdiction of the court only presented the question whether this is a case in which the

Ill. 56 (1853); Chicago Portrait Co. v. Chicago Crayon Co., 118 Ill. App. 98, 101 (1905); Hanover, etc., Co. v. Brown, 77 Md. 64, 25 Atl. 989, 27 Atl. 314, 39 Am. St. Rep. 386 (1893); Ordinary of Charleston v. Mortimer, 4 Rich. (S. C.) 271 (1851); Estes v. Whipple, 12 Vt. 373, 376 (1840); Cooledge v. Continental Insurance Co., 67 Vt. 14, 27, 30 Atl. 798 (1894); Riley v. Yost, 58 W. Va. 213, 52 S. E. 40, 1 L. R. A. (N. S.) 777 (1905). But a schedule annexed in indebitatus assumpsit is in some states held to form part of the declaration. Page v. Babbit, 21 N. H. 389, 390 (1850); Rider v. Robbins, 13 Mass. 284 (1816); Kinder v. Shaw, 2 Mass. 398, note (1807).

[35] The statement of facts is abridged and a portion of the opinion is omitted.

relator could obtain a change of venue; for the record showed that the venue had been changed, and that estopped the party from denying that fact by a plea. It is not competent for the party to plead in contradiction to the record itself in the same cause. The court must take notice of the contents of the record of the case.[36] Suppose the plea had averred distinctly that there had been no change of venue, or had denied the existence of some other order which the record showed had been made in the cause, it would be absurd to say that the plaintiff should take issue upon the plea and produce the record. To admit the party to deny the existence of any portion of the record of the cause at bar would be something new in pleading. The record itself stands as a perpetual estoppel to such a plea, and the objection may be taken by demurrer to the plea, and perhaps it might be treated as a mere nullity. This plea, then, cannot be considered as denying that in fact an order had been made changing the venue in the cause.

[The court then treated the plea as presenting the question whether the statute authorized a change of venue in such a case, and held that it did.]

Judgment reversed.[37]

SECTION 12.—PARTIAL DEFENSES

FLEMMING v. MAYOR AND COUNCIL OF CITY OF HOBOKEN.

(Supreme Court of New Jersey, 1878. 40 N. J. Law, 270.)

In debt. Motion to strike out pleas.

DIXON, J.[38] The declaration in this case is founded on "improvement certificates" of the same character as that in Knapp v. Hoboken, 39 N. J. Law, 394, and the counts are also similar in substance to those of that cause.

The present motion is to strike out pleas to the third breach, as assigned in several counts, which is to the effect that the defendants did

[36] That it is unnecessary to plead facts of which the court takes judicial notice is well settled. See cases cited in 12 Ency. Pl. & Pr. 1; 31 Cyc. 47.

[37] "This is declared to be a public law, and, being so, we are bound to take judicial notice of it, and to disregard all allegations in conflict with it." Campbell, J., in People v. River Raisin, etc., Co., 12 Mich. 389, 397, 86 Am. Dec. 64 (1864).

Where action is brought for extra damages under a statute, all facts must be averred necessary to show the case to be brought under the statute, and, according to some authorities, specific reference to the statute must be made. Howser v. Melcher, 40 Mich. 185 (1879); Bayard v. Smith, 17 Wend. (N. Y.) 88 (1837); 5 Ency. Pl. & Pr. 727.

[38] A portion of the opinion is omitted.

not use due diligence in making and collecting an assessment for the improvement in the certificates mentioned.

The first plea attacked is pleaded in terms to so much of that breach in one count as alleges that the defendants did not use due diligence in making the assessment, and avers that the plaintiff ought not to maintain his action therefor, because the defendants did use due diligence in making the assessment.

The objection urged against this plea is that it does not answer the whole of the breach.

This does not seem to me to be a valid objection.

The plea, in its beginning, purports to answer only part of the breach, and that part, and no more, it answers by a denial. The part so answered is severable from the rest as a ground of recovery, the making of the assessment being quite distinct from its collection; and it is also material, for it might occasion a different measure of damages, since only after the assessment is made and confirmed does interest, as such, begin to run on the principal mentioned in the certificate.

For the propriety of such a plea there is abundant authority. 1 Chitty on Pl. 523; Steph. on Pl. *257; Clarkson v. Lawson, 6 Bing. 587; McGregor v. Gregory, 11 M. & W. 287.

Its sufficiency has been denied in the courts of New York.

In Sterling v. Sherwood, 20 Johns. (N. Y.) 204, Spencer, C. J., sustaining a demurrer to pleas, censures the rule laid down by Chitty and cites, as opposed to it, Riggs v. Denniston, 3 Johns. Cas. (N. Y.) 205, 2 Am. Dec. 145, and the opinion of Willes, C. J., in Bullythorpe v. Turner, Willes, 475.

The case of Riggs v. Denniston, however, by no means justifies his position, for there the pleas condemned professed in their introduction to answer the whole count, but set up what answered only part. Such pleas are clearly bad, and the proper way to meet them is by demurrer. Of the cases cited in Riggs v. Denniston by Kent, J., to support his judgment, Thornel v. Lassels, Cro. Jac. 26, and Ascue v. Sanderson, Cro. Eliz. 433, were both demurrers to pleas manifestly infected with this vice; and the other so cited, Carr v. Donne, 2 Vent. 193, seems to be of the same character, although the report is somewhat obscure.

The case of Bullythorpe v. Turner (ubi supra) is opposed to the rule as given by Chitty, but I cannot help thinking that it rests upon a misapprehension of Thornel v. Lassels, which it improperly regards as being contrary to Herlakenden's Case, 4 Rep. 62, and as holding that a plea which purports to answer, and answers only part of a count, must be bad. The remarks of Chief Justice Willes are also, I think, founded on error, for he seems to suppose that, under the rule, the defendant has only to plead such a partial plea in order to drive the plaintiff into a discontinuance, and he does not distinguish between a defective plea to the whole of a count and a valid plea to part of a count.

Sterling v. Sherwood was followed in Hickok v. Coates, 2 Wend. (N. Y.) 419, 20 Am. Dec. 632, Slocum v. Despard, 8 Wend. (N. Y.) 615, and Etheridge v. Osborn, 12 Wend. (N. Y.) 399; but in the last case, Judge Sutherland, who, in 8 Wend. 615, had followed Sterling v. Sherwood without criticism, states that, if it were an open question, he would regard the rule laid down by Chitty as the sound one, but that the rule in New York is settled otherwise.

I think, therefore, that we should adhere to the English rule. Neither it nor its consequences, as usually stated, were at all irrational. If the plea answer all it professes to answer, and that is a material and severable part of the count, and no other defence be interposed to the rest of the count, then the plaintiff must reply or demur to the plea; and as to the part of his count not answered, he must enter judgment as by nil dicit, or he will work a discontinuance. Herlakenden's Case, 4 Rep. 62; Weeks v. Peach, 1 Salk. 179.[39]

If the rest of the count be elsewhere answered, the plaintiff cannot take judgment by nil dicit, for the whole of his claim is then put in issue. Clarkson v. Lawson, 6 Bing. 587.

If the plea profess to answer the whole count, but, in its substance, answer only part, the plaintiff should demur, for the plea is bad. Earl of Manchester v. Vale, 1 Saund. 27; and see Williams' notes to this case; Woodward v. Robinson, 1 Strange, 302; Everard v. Patterson, 6 Taunt. 625; Earl of St. Germains v. Willan, 2 B. & C. 216.[40]

This plea should stand.[41]

SECTION 13.—OVERNARROW DENIALS

PHILLIPS v. CROSBY.

(Court of Errors and Appeals of New Jersey, 1904. 70 N. J. Law, 785, 59 Atl. 142.)

SWAYZE, J.[42] The declaration in this case is extremely informal, but it is possible to gather from its averments that the action is brought

[39] As to whether a failure to enter judgment as by nil dicit will work a discontinuance, there is some conflict of authority. For a full discussion, see 16 Ency. Pl. & Pr. 574–577.

[40] Baldwin v. Church, 10 Mod. 323 (1716), and numerous cases cited in 31 Cyc. 140, note 47. Accord.

[41] In addition to the cases cited in the text, see Mitchell v. Sellman, 5 Md. 376, 384 (1854), semble; Lyman v. Dodge, 13 N. H. 197 (1842), semble; Somerville v. Stewart, 48 N. J. Law, 116, 3 Atl. 77 (1886); Carpenter v. Briggs, 15 Vt. 34 (1843). Accord. Edwards v. White, 12 Conn. 28, 36 (1837); Wilmarth v. Babcock, 2 Hill. (N. Y.) 194 (1842); Young v. Fentress, 10 Humph. (Tenn.) 151 (1849). Contra.

[42] Portions of the opinion are omitted.

to recover damages for breach of warranty upon the sale of stock in an oil company. Phillips v. Crosby, 69 N. J. Law, 612, 55 Atl. 814. There is a single plea, which denies the alleged sale of stock, and also denies the making of the warranties set forth in the declaration. Notwithstanding the duplicity of the plea, the plaintiff joined issue thereon. At the close of the case the court ordered a nonsuit upon the ground that there was a failure to prove the amount of damages sustained by the plaintiff.

This was clearly erroneous. If the contract and the breach thereof were proved, the plaintiff was entitled to nominal damages at least. Furniture Company v. Board of Education, 58 N. J. Law, 646, 35 Atl. 397.

The defendant now insists that the nonsuit must be sustained because the plaintiff failed to prove a warranty. * * * The nonsuit cannot be sustained upon this ground.

The defendant also insists that there was a failure to prove a breach of the alleged warranty. This question is not presented upon the present record. The declaration avers that the representations were false. The plea specifically denied the making of the contract, and the representations. It failed to deny the falsity of the representations. The plea must, according to the general rule of pleading, be taken to confess such traversable matter of fact as it does not traverse. 1 Chitty, 616 (14th American Edition). The only issues upon the record are the making of the contract and of the representations. * * *

The judgment should be reversed, and a venire de novo awarded.[43]

BASAN v. ARNOLD.

(Court of Exchequer, 1840. 6 Mees. & W. 558.)

Assumpsit on a bill of exchange for £68. 9s. at three months, drawn by one Philip Lazarus upon and accepted by the defendant, and endorsed by the said Philip Lazarus to J. C. Batho, who endorsed the same to the plaintiff.

Pleas—first * * *; secondly. *

The defendant pleaded, thirdly, that, after the said bill was endorsed to the plaintiff, and before the commencement of this suit, to wit, on the 29th of July, 1839, he the plaintiff endorsed the said bill, upon good and sufficient consideration, to a certain person whose name is to the defendant unknown, and the defendant then became and still is liable to pay the amount of the said bill to the said person to whom

[43] Savage v. Walshe, 26 Ala. 619, 633 (1855); Taylor v. Spears, 6 Ark. 381, 44 Am. Dec. 519 (1850); Supreme Lodge v. Lipscomb, 50 Fla. 406, 416, 39 South. 637 (1905); Simmons v. Jenkins, 76 Ill. 479, 482 (1875); Union Bank v. Ridgely, 1 Har. & G. (Md.) 324, 415 (1827); Ayer v. Spring, 10 Mass. 80, 83 (1813); Morris v. Corson, 7 Cow. (N. Y.) 281 (1827); 31 Cyc. 207, 208. Accord.

it was so endorsed, and who from the time of that endorsement hitherto has been and is the holder thereof; and this the defendant is ready to verify, &c.

To the second plea the plaintiff replied de injuria; and to the third he replied that at the time of the commencement of this suit the plaintiff was, and still is, the holder of the said bill; without this, that any other person is the holder thereof, in manner and form as in that plea is alleged.

To both these replications the defendant demurred, and assigned the following causes: * * * To the replication to the last plea, that the special traverse, being the concluding part of the said replication to the last plea, which is the part thereof which professes to take issue on the plea, does not put in issue the allegation contained therein, that such other person was the holder of the bill at the time of the commencement of the suit, or of the plea being pleaded, but seeks to raise an issue whether any other person was such holder at the date of the said replication. That if the said replication puts in issue the fact, whether any other person than the plaintiff were such holder at the time of such plea being pleaded, the issue thereby raised is immaterial. That if the plaintiff intended to rely on the allegation in the replication, that the said plaintiff was, at the time of the commencement of the suit, and still is, the holder of the said bill of exchange, the plaintiff should not have pleaded the same as inducement to the special traverse, but should have concluded to the country, with the addition of such special traverse. And, further, that the plaintiff, in the said replication, hath so replied as to leave the said defendant in doubt as to the part of the said replication on which the plaintiff means to take issue, and that the said traverse is double and immaterial.

Joinder in demurrer.[44]

PARKE, B. The replication would make it necessary for the defendant to show not only that the plaintiff was not the holder at the commencement of the action, but that he was not so at the time of the plea pleaded. The allegation is that no other person is the holder thereof; such a traverse is too large, because it makes it incumbent on the defendant to show that another person, and not the plaintiff, was the holder, both at the commencement of the action and at the time of the plea being pleaded. The latter fact is immaterial, and therefore the replication is bad. I think the word "is" refers to the time of the plea pleaded. Both parties may have leave to amend, otherwise there must be judgment for the plaintiff on the replication de injuria, and for the defendant on the replication to the third plea.

ALDERSON, B. I am of opinion that the replication to the third

[44] The statement of facts is abridged.

plea is bad. The plaintiff has pleaded in such a way as to compel the defendant to prove that which is immaterial.

The rest of the court concurred.

Leave to amend accordingly.[45]

TATEM & POULTER v. PERIENT.

(Court of King's Bench, 1611. Yelv. 195.)

The defendant granted to the plaintiffs 1000 trees in such a wood to be cut down within three years after the grant; and afterwards they agreed, when the plaintiffs had cut down some of the trees, that they should not fell any more during the three years, and that the defendant would licence them after the three years to fell as many trees as amounted to the full number of 1000, and because the defendant hindered them after the three years from felling the trees they brought assumpsit, and declared and shewed the grant aforesaid; and that in consideration they would forbear the felling any more trees till after the three years, the defendant promised to give licence to the plaintiffs to fell as many trees there after the three years as amounted to 1000, and alleged in facto that at the time of the promise they had cut down but 800 trees, and non amplius, and that they relying on the promise had forborn to fell any more within the three years, and that after the three years the defendant hindered them from selling the residue, which made 1000 trees, to their damage, etc. The defendant pleaded that, before the promise supposed to be made by the defendant, the plaintiffs had felled 1000 trees, absque hoc, that at the time of the promise they had felled but 800 trees only, etc., and thereupon the plaintiffs demurred. And it was adjudged against the plaintiffs; yet it was objected, that the traverse was insufficient and idle, for the defendant's plea had been good without any traverse at all; for it was a full answer to say that they had felled 1000 trees, without more, and that would make an issue. 2. The traverse ought to have been, absque hoc, that the plaintiffs at the time of the promise had felled but 800 trees, omitting the (only) for the alleging of that in the declaration was but to increase damage, and not matter of substance as to the action. But per totam curiam the traverse is good, for the plaintiffs by alleging the felling of 800 trees only in their declaration, which is a matter issuable, have given the defendant advantage to traverse in the manner as he hath done; for every matter in fact alleged by the plaintiffs may be

[45] Moore v. Boulcott, 1 Bing. N. C. 323 (1834); Thurman v. Wild, 11 A. & E. 453 (1840); Cassady v. Clarke, 7 Ark. 123, 131 (1851); Sydam v. Cannon, 1 Houst. (Del.) 431 (1857); Marx v. Culpepper, 40 Fla. 322, 24 South. 59 (1898); Graham v. Dixon, 3 Scam. (Ill.) 115, 117 (1841); Yingling v. Hoppe, 9 Gill. (Md.) 310, 314 (1850). Accord.

traversed by the defendant, and the defendant by way of traverse may answer the matter alleged in the same words the plaintiffs allege them, and then the plaintiffs have by their demurrer on the bar confessed the felling of 1000 trees, which was their full bargain at first, and by consequence there is no consideration on which to ground the promise. Quod nota. By all the JUSTICES. Yelverton was of counsel with the defendant.[46]

SECTION 14.—NEGATIVE PREGNANT

HOWK v. POLLARD.

(Supreme Court of Indiana, 1841. 6 Blackf. 108.)

BLACKFORD, J.[47] This was an action of debt brought by Pollard, assignee, etc., on a sealed note for the payment of money.

Three pleas: 1. Actio non. The note was given in consideration, that the payees would assign to the defendant certain certificates for three tracts of land, each tract containing eighty acres. Averment, that the tracts of land did not contain eighty acres each, etc. Wherefore, etc. 2. Actio non. The consideration of the note was as stated in the first plea. Averment, that the payees did not assign the certificates for the tracts of land containing eighty acres each, Wherefore, etc. 3. As to 400 dollars part, etc., no consideration as to that part. * * *

The second plea tenders an informal issue, and may therefore be specially demurred to. The traverse in that plea, that the vendors had not assigned the certificates for tracts of land containing eighty acres each, is too large. The plea is a negative pregnant. It implies that the certificates for the tracts containing less than eighty acres each had been assigned; and that implication destroys the effect of the plea as a bar to the whole cause of action.

The replication to the third plea is also objectionable. The circum-

[46] Leke's Case, 3 Dyer, 365 (1579); Cockerill v. Armstrong, Willes 99, 103 (1738); Carvick v. Blagrave, 1 Brod. & Bing. 531 (1820); Dorn v. Gashford, 1 Com. 44 (1698); Curtis v. Spetty, 1 Bing. N. C. 756 (1835); Smith v. Dixon, 7 A. & E. 1 (1837). Accord. The same principle is applied in the following cases: Stewart v. Tucker, 106 Ala. 319, 17 South. 385 (1895); Wilkinson v. Pensacola Co., 35 Fla. 82, 17 South. 71 (1895); Gridley v. Bloomington, 68 Ill. 47 (1873); Jerome v. Whitney, 7 Johns. (N. Y.) 321 (1811). See, also, Stephen Pleading (Williston's Ed.) *282, *283; 2 Wm.'s Saund. 206a, note 22. But see Osborne v. Rogers, 1 Wm.'s Saund. 267 (1670); Palmer v. Ekins, 2 Str. 817 (1728).

[47] A portion of the opinion is omitted.

stance that this plea is only pleaded to a part of the cause of action seems to have been overlooked by the plaintiff.

PER CURIAM. The judgment is reversed with costs. Cause remanded, etc.[48]

SECTION 15.—INCONSISTENCY

SEAL v. VIRGINIA PORTLAND CEMENT CO.

(Supreme Court of Appeals of Virginia, 1908. 108 Va. 806, 62 S. E. 795.)

HARRISON, J.[49] In this case the plaintiff has set forth his cause of action in a declaration containing three counts. The defendant company demurred to the declaration and to each count thereof, and the circuit court sustained the demurrer, upon the ground that the second count was repugnant to the first and third counts, and dismissed the case.

This was manifest error. The alleged repugnancy consisted in the statement in the first and third counts that the defendant, after its attention was called to the danger, promised to remedy it, and the statement in the second count that it assured the plaintiff that there was no danger and directed him to continue the work. Had these two allegations appeared in one and the same count, as occurring at one time, they would have been inconsistent and repugnant.[50] Each count,

[48] Robsert v. Andrews, Cro. Eliz. 82 (1588); Myn v. Cole, Cro. Jac. 87 (1606); 1 Chitty (16 Am. Ed.) 550; 31 Cyc. 203–205. Accord. See Jones v. Jones, 16 Mees. & W. 699, 707–710 (1847), for a full discussion of the doctrine.

"It is under this head of ambiguity that the doctrine of negatives pregnant appears most properly to arrange itself. A negative pregnant is such a form of negative expression as may imply or carry within it an affirmative. This is considered as a fault in pleading; and the reason why it is so considered is that the meaning of such a form of expression is ambiguous. In trespass for entering the plaintiff's house, the defendant pleaded that the plaintiff's daughter gave him license to do so, and that he entered by that license. The plaintiff replied that he did not enter by her license. This was considered as a negative pregnant; and it was held that the plaintiff should have traversed the entry by itself, or the license by itself, and not both together. It will be observed that this traverse might imply or carry within it that a license was given, though the defendant did not enter by that license. It is, therefore, in the language of pleading, said to be pregnant with that admission, viz. that a license was given. At the same time the license is not expressly admitted; and the effect, therefore, is to leave it in doubt whether the plaintiff means to deny the license, or to deny that the defendant entered by virtue of that license. It is this ambiguity which appears to constitute the fault." Stephen, Pleading (Williston's Ed.) *419, 420. See, also, Id. appendix *xci, note 55.

[49] A portion of the opinion is omitted.

[50] Merrill v. Sheffield Co., 169 Ala. 242, 53 South. 219 (1910); Florida, etc., Co. v. Ashmore, 43 Fla. 272, 283, 32 South. 832 (1902); Keeshan v. Elgin, etc., Co., 132 Ill. App. 416 (1907); Hersey v. Northern Assurance Co., 75 Vt. 441, 446, 56 Atl. 95 (1903); Greaves v. Neal (C. C.) 57 Fed. 816, 820 (1893). Accord. Cf. Dick v. McPherson, 72 N. J. Law, 332, 62 Atl. 383 (1905).

however, is a separate declaration, and the plaintiff has the right to present his case with such variation of statement as he thinks necessary to meet every possible phase of the testimony. This is one of the objects and purposes of adding several counts, so that, if the plaintiff fails in the proof on one count, he may succeed in another and thereby prevent a fatal variance. B. & O. R. Co. v. Whittington's Adm'r, 30 Grat. 805, 811; New River M. Co. v. Painter, 100 Va. 507, 510, 42 S. E. 300; Barton's Law Pr. vol. 1, p. 300.

It is the universal practice in this state, in tort cases, for the plaintiff to present his case in different counts, varying his statements in each count to meet the different phases of the testimony at the trial; and the action of the circuit court in sustaining the demurrer to the declaration, upon the ground of repugnancy between the counts, was contrary to this general practice and to the decisions of this court. * * *[51]

PRIEST v. DODSWORTH.

(Supreme Court of Illinois, 1908. 235 Ill. 613, 85 N. E. 940, 14 Ann. Cas. 340.)

FARMER, J.[52] This was an action of assumpsit, brought by appellee (hereafter referred to as plaintiff) against the appellants (hereafter referred to as defendants), to recover the balance due on a promissory note given for the principal sum of $4,000. Plaintiff is a lawyer, and at the time the note was given was practicing his profession in Jacksonville, Ill., and the note, it is claimed by him, was given for services rendered at the time the note was given and to be thereafter rendered as attorney. The case was tried before the court without a jury, and resulted in a judgment in favor of plaintiff for $1,895.56. Defendants prosecuted an appeal to the Appellate Court for the Third District, where the judgment of the circuit court was affirmed, and they have brought the case to this court by further appeal. * * *

It is contended that the court erred in overruling the demurrer of defendants to the fourteenth replication, as amended, to the first plea of J. R. Dodsworth. This, as we have said, was a plea of failure of consideration. In substance, it averred that the consideration for the note was the agreement of plaintiff that he would successfully defend and maintain defendant's (J. R. Dodsworth's) title to and possession of $84,000 in notes given him by his grandmother, and that if he (plaintiff) failed to do this he would return to said defendant said note; that, by reason of the timidity, negligence, and carelessness of plaintiff in maintaining said defendant's rights, defendant lost title to and

[51] White v. Snell, 9 Pick. (Mass.) 16 (1829); Berringer v. Cobb, 58 Mich. 557, 25 N. W. 491 (1885); Barton v. Gray, 48 Mich. 164, 167, 12 N. W. 30 (1882). Accord. Cf. Mullaly v. Austin, 97 Mass. 30, 33 (1867).

[52] A portion of the opinion is omitted.

possession of notes of the value of $69,000, whereby the consideration for the note sued on wholly failed. By the amended fourteenth replication plaintiff denied that the consideration for the note failed, as alleged in the plea, and denied that it was to be returned if he failed to successfully defend J. R. Dodsworth's title to the notes. It also set out with much detail the history of the trouble between the members of the Dodsworth family, the litigation growing out of it, the employment of plaintiff, the circumstances attending the giving of the note, and the purposes for which it was given, and the services rendered by the plaintiff in the controversy. It also sets out with much particularity a compromise of all controversies between the parties, effected by plaintiff, and consented and agreed to by J. R. and W. C. Dodsworth and their sister, Prudence, by which they obtained title to about $90,000 worth of their grandmother's property.

The demurrer to this replication, we think, should have been sustained. It is both a traverse and a confession and avoidance. The issue tendered by the plea was that plaintiff failed to keep and perform his agreement to successfully defend J. R. Dodsworth's title to the notes, but negligently and carelessly failed in this regard, whereby the consideration for the note in suit failed. If the replication had admitted that the consideration for the note was the agreement set out in the plea, and sought to avoid it by setting up a compromise and settlement of the litigation by mutual agreement between the parties, the facts, or some of them, alleged in the replication would have been proper; but as the replication denies that the consideration for the note was as averred in the plea, and denies that it failed, the averments as to the compromise of the controversy between the parties, and of plaintiff's services therein, meet no issue tendered by the plea. A party may file as many pleas or replications as he chooses, and they may be inconsistent with each other;[53] but each pleading must be complete and consistent with itself, and must answer the pleading it is intended as an answer to. If it is desired to put in issue the truth

[53] Repugnancy between pleas is generally no ground for objection. Peoria, etc., Co. v. Barton, 38 Ill. App. 469 (1890); Miller v. Stanley, 186 Ill. App. 340 (1914); Union Bank v. Ridgely, 1 Har. & G. (Md.) 324, 406 (1827); Merry v. Gay, 3 Pick. (Mass.) 388 (1826); True v. Huntoon, 54 N. H. 121 (1873); Shallcross v. West Jersey, etc., Co., 75 N. J. Law, 395, 67 Atl. 931 (1907); Shuter v. Page, 11 Johns. (N. Y.) 196 (1814); Ferber v. Gazette, etc., Ass'n, 212 Pa. 367, 61 Atl. 939 (1905). See, also, Granite State Bank v. Otis, 53 Me. 133 (1865); Waller's Ex'rs v. Ellis, 2 Munf. (Va.) 88 (1810). Cf. Pope v. Latham, 1 Ark. 66 (1845). But a plea which admits a cause of action and plaintiff's right to maintain it cannot be joined with one absolutely denying same. O'Meara v. Cardiff Coal Co., 154 Ill. App. 321 (1910: general issue and tender); Union Bank v. Ridgely, 1 Har. & G. (Md.) 324, 407 (1827: semble, general issue and tender); Shombeck v. De La Cour, 10 East, 326 (1808: tender and alien enemy); 31 Cyc. 148, note 19. Under statute of 4 and 5 Anne, c. 16, leave of court was required to file more than one plea, and this leave was at first refused where the proposed pleas were inconsistent. See Chapman v. Sloan, 2 N. H. 464 (1822); Peters v. Ulmer, 71 Pa. 402 (1873); Fox v. Chandler, W. Bl. 905 (1773); Arnold v. Bass, W. Bl. 993 (1775); Stephen, Pl. (Williston's Ed.) *310.

of the allegations of a plea, this is done by a denial of them, called a "traverse." If this is not desired, but it is desired to set up matter in justification or in excuse, this must be done by way of confession and avoidance. While the plaintiff may in one replication traverse a plea and in another confess and avoid, the two defenses are repugnant, and cannot be embraced in the same replication. Stephen's Pl. 137; 1 Chitty's Pl. 623; 1 Tidd's Pr. 684. The necessity for this rule of pleading and its observance is manifest, for the reason that evidence may be admissible under a traverse that would be incompetent under a confession and avoidance, and vice versa.

We are of opinion the circuit court erred in overruling the demurrer to the fourteenth replication to the first plea of J. R. Dodsworth. The judgment of the circuit court, and of the Appellate Court, affirming the judgment of the circuit court, will therefore be reversed, and the cause remanded to the circuit court.

Reversed and remanded.[54]

WHITAKER v. FREEMAN.

(Circuit Court, District of North Carolina, 1827. Fed. Cas. No. 17,527a, 29 Fed. Cas. 955.)

MARSHALL, Chief Justice.[55] This is an action on the case founded in a libel published by the defendant. He has pleaded not guilty, and also justified the words as being true. At the trial, the plaintiff gave in evidence a letter written by the defendant to his correspondent in Raleigh, for the purpose of being shewn to others, which contains substantially the charges stated in the declaration, but in different language. The plaintiff insisted at the trial—1st, that the plea of justification admitted the publication of the libel charged in the declaration and dispensed with the necessity of proving it; 2dly, that the letter given in evidence supported the declaration. The jury found a verdict for the plaintiff, subject to the opinion of the court on the two points reserved.

1. On the first point the plaintiff produced cases to show that the plea of justification contains a formal admission of the words charged in the declaration, and would not be good without such admission. It must confess and avoid the charge. He then insisted that this being a confession on record was stronger than a confession made orally in the country, and estopped the party from denying it. In support of

[54] Keokuk, etc., Bridge Co. v. Wetzel, 228 Ill. 253, 81 N. E. 864 (1907); Farmers, etc., Co. v. Koons, 120 Ill. App. 303 (1905); Mix v. People, 92 Ill. 549, 553 (1879); Wright v. Card, 16 R. I. 719, 19 Atl. 709 (1890). Accord. Cf. Smith v. Yeomans, 1 Saund. 316 (1670); Hapgood v. Houghton, 8 Pick. (Mass.) 451 (1829).

[55] The statement of facts and a portion of the opinion are omitted.

this last proposition he relied on the generally admitted dignity of record evidence, and cited Goddard's Case, 2 Coke, 4, 6. In Goddard's Case the court, after saying that the jurors, who are sworn to say the truth, shall not be estopped, for an estoppel is to conclude one to say the truth, added: "But if the estoppel or admittance be within the same record in which issue is joined upon which the jurors shall give their verdict, then they cannot find anything against that which the parties have affirmed and admitted of record, although the truth be contrary, for a court ought to give judgment upon a thing confessed by the parties, and the jurors are not to be charged with any such thing, but only with things in which the parties differ." In Goddard's Case, as was very properly remarked by the counsel for the defendant, there was a single plea, and the admission and agreement of parties, to which the observation of the court applies, are made in the particular and single issue which the jury was sworn to try. The language of the court is applicable to such a case only. The jury, though not generally "estopped to say the truth, is estopped if the admittance be within the same record in which issue is joined upon which the jurors shall give their verdict." When this case was decided a record contained a single issue, and the word "record" might be used generally in the same sense with the word "issue." The relative "which," in the last instance, refers to "issue," upon which issue the jurors shall give their verdict. This is proved clearly by the reason the court assigns why a jury is estopped from finding the truth contrary to such admission. It is that "a court ought to give judgment upon a thing confessed by the parties, and the jurors are not to be charged with any such thing." Now, the jurors are charged with every issue of the cause, and must pass on every issue. The court cannot give judgment until a verdict is found on each. Indeed, I do not understand the plaintiff to contend that the admission in one plea estops the jury from finding the truth in an issue made upon different plea; but that the admissions in one plea may be given in evidence in support of a different issue in the same cause. Goddard's Case, then, turns on a principle entirely distinct from this, and inapplicable to it. In Kirk v. Nowill, 1 Term R. 118, Buller, J., said that several pleas in the same cause were "as unconnected as if they were in separate records." In England, under the statute of 4 and 5 Anne, c. 16, the defendant is allowed to plead several pleas with leave of the court. In commenting upon this statute, Bacon says, in his Abridgment (volume 5, p. 448): "It hath been frequently insisted upon that a defendant could not, within this act, plead contradictory and inconsistent pleas, as non assumpsit and the statute of limitations, etc." But the court has allowed such pleas, "observing that, if the benefit of the statute was to be confined to such pleas as are consistent, it would hardly be possible to plead a special plea and a general issue, the one always denying the charge, the other generally confessing and avoiding it, and the statute itself makes no

distinction herein." In conformity with this rule the English books on the subject of pleading in all their forms of special pleas state the general issue as being first pleaded. This would be entirely useless if the admissions contained in almost every special plea in bar could be used to disprove the facts alleged in the general issue. The English books do not, I believe, furnish a decision, or even a dictum, to countenance the idea that the matter of one plea can be brought in evidence against another. Their entire independence of each other has been often held. In Grills v. Mannell, Willes, 378, the attempt was to aid one plea, to which a demurrer had been filed, by an averment in a subsequent plea. Lord Chief Justice Willes, in delivering the opinion of the court, said: Though he has denied it in his second plea (that the opposite party was seised in fee), that will make no alteration, it being a known rule, and never controverted, that one plea cannot be taken in to help or destroy another, but every plea must stand or fall by itself. This opinion undoubtedly applies to the sufficiency of a plea in point of law. It asserts that one plea cannot be affected in point of law by a fact averred in a different plea, not that such facts may not be used as evidence, but it shows that the distinct pleas in the same cause are entirely independent of each other, and have no technical connexion. The same principle is laid down in the case of Kirk v. Nowill, 1 Term R. 118. That was an action of trespass, in which the general issue and three special pleas in bar were pleaded. The jury found three issues for the plaintiff and the last for the defendant. The plaintiff obtained a rule to show cause why judgment should not be entered up in his favor, because the last plea on which the verdict was found for the defendant was no bar to the action. The defect in the fourth plea was cured by an averment in the second and third; but the court made the rule absolute; and Buller said: "There never was such an idea before, as the counsel against the rule have suggested that one plea might be supported by what was contained in another. Each plea must stand or fall by itself."

It is admitted that these cases apply only to the entire independence of different pleas in point of law; but they certainly show that the facts alleged in one plea have no more influence on an issue made upon a distinct plea in the same cause than if the same matter had been pleaded in a different cause. Ever since the statute of Anne it has been usual in England, where the defendant meant to justify, to plead also the general issue. This is so apparently useless if the plea of justification amounts to a confession which can be transferred to the general issue, that a court would not give leave to plead both pleas where the right depended on the court, and the defendant would not ask it where useless pleas are attended with heavy expenses. The principle in pleading that a special plea must confess and avoid the fact charged in the declaration was introduced at a time when the rigid practice of courts required that every cause should be placed on a

single point, and when it was deemed error to plead specially matter which amounted to the general issue; it was not allowed to deny the fact and to justify it. The defendant might select his point of defence; but, when selected, he was confined to it. That a single point might be presented to the jury, he was under the necessity of confessing everything but that point. The attention of the jury was not directed to multifarious objects, but confined to one on which alone the cause depended. This rigid rule was undoubtedly productive in many instances of great injustice. The legislature in England thought proper to change it, and to admit of various defences in the same action. But the forms of pleas remained. The permission to put in more than one with leave of the court did not vary the established forms. The admissions which are contained in one plea respect only the issue made up on that plea. The purpose for which the rigor of the ancient rule was relaxed by law would be defeated if the matter of one plea were to destroy another. There is no more reason that a plea of justification should prove the libel on issue of not guilty than that it should support a new action for a libel founded on the plea itself. It contains an averment that the words were true, and, if uttered by the defendant, not in his defence by way of plea, but as a substantive and voluntary allegation, would be the foundation of a new action. But such a plea has never been so considered. Whether the reason is that the allegation is in the form prescribed by law, which the defendant must use in order to avail himself of a defence allowed by law, or that the plea is put in by counsel, and the words are used by him, and are not the words of the defendant, the reason operates as strongly against their being used as testimony in support of the general issue as against their being used in support of a new action founded on the plea. Certain it is, that in England this use has never been made of them.

In the United States, generally, the rigor of the ancient rule that the defence shall be confined to a single point has been relaxed still further than in England. In most of the states—and North Carolina is understood to be among them—the defendant has a legal right without asking the court, to plead as many several matters as may be necessary or as he may think necessary for his defence. It would be entirely inconsistent with the spirit and object of these acts to permit forms of pleading devised at a time when judicial proceedings were regulated on a principle which they were intended to change to render one of the defences which they authorise, an absolute nullity. In England this has never been attempted. The courts there will not exercise the power they possess to restrain the defendant from pleading inconsistent pleas, because such restraints would defeat the policy of the act of parliament. The policy of the acts passed on the same subject in the United States is still more apparent. It is true that in one state the principle maintained by the plaintiff in this cause has been sustained. The very respectable court of Massachusetts has decided that

in an action for slander the admissions contained in a plea of justification do of themselves disprove the plea of not guilty. I am far from disregarding any opinion of that court. But I believe it stands alone, and that no similar decision has been made in any state of the Union. It constitutes no inconsiderable deduction from the authority of the decision in Massachusetts that there is reason for the opinion that it was disapproved generally by the bar. The legislature of that state has enacted that henceforth the plea of justification shall not in an action of slander be taken as proof that the words were spoken if not guilty be also pleaded. This act of the legislature shows I think that the general sense of the profession, even in that state, was opposed to the decision of the court.

I think a fair construction of the act which authorises the defendant to plead several pleas, that he may use each plea in his defence, and that the admissions unavoidably contained in one cannot be used against him in another. It was therefore incumbent on the plaintiff in this case to prove the libel charged in the declaration. * * *[56]

SECTION 16.—DEPARTURE

POTTS v. POINT PLEASANT LAND CO.

(Supreme Court of New Jersey, 1885. 47 N. J. Law, 476. 2 Atl. 242.)

REED, J. The declaration is for breach of covenant. It sets out a contract under seal, by the terms of which the plaintiffs were to perform for the defendants certain work in filling and grading certain lots and claying certain sidewalks at Point Pleasant. It then declares that the defendants did covenant, in consideration of the faithful performance of the said work, to pay 18 cents per cubic yard for the sand or clay removed; the payment to be made by a deed of real estate, by an assignment of certain mortgages, by orders for guano, and by the payment of cash.

It then avers the due performance of the work on the part of the plaintiffs, and the failure of the defendants to perform their covenant to make payment according to the terms of their contract.

To this declaration the defendants pleaded, among others, the plea that the performance of the work was a condition precedent to the plaintiffs' right to payment, and that the plaintiffs had not performed the said work.

[56] Harington v. Macmorris, 5 Taunt. 228 (1813); Pope v. Welsh's Adm'r, 18 Ala. 631 (1851); West Chicago, etc., Co. v. Morrison, etc., Co., 160 Ill. 288, 295, 43 N. E. 393 (1896); Nye v. Spencer, 41 Me. 272 (1856); Carter v. Piper, 57 N. H. 217, 219 (1876); Noonan v. Bradley, 9 Wall. 394, 402, 19 L. Ed. 757 (1869). Accord. Jackson v. Stetson, 15 Mass. 48 (1818). Contra.

To this plea the plaintiffs replied that, although they tendered themselves ready and willing to complete the said work, the defendants notified them to remove from the defendants' land all the plaintiffs' materials, tools, and working implements, by reason of which they were prevented from continuing said work according to the terms of the contract. To this replication a demurrer was filed.

The point of the demurrant upon the argument was that the ground upon which the plaintiffs based their right of action, in their replication, was a clear departure from the position taken by them in their declaration.

The counsel for the plaintiffs contended that the replication fortified the case made by the declaration, and so was legitimate. The design of a replication is to put upon the record some new facts which show that, notwithstanding the existence of the matters pleaded by the defendant, the declaration is yet true.

Thus, if plaintiff declares upon a statute, and defendant pleads that it is repealed, a replication that it has been revived by a subsequent act is good; for the reviving act gives renewed effect to the first on which the action is founded. Gould, Pl. 445.

So, if in trespass the defendant justifies for a distress, damage feasant, the plaintiff may reply that the defendant afterwards converted to his own use; for this shows the taking to be a trespass ab initio. Comyn, Dig. "Pleader," 11.

These are obvious instances of a fortification of the position first taken by the pleader. But in the two pleadings of the plaintiffs in the present case it appears manifest that the grounds upon which the plaintiff rests his claim are in each distinct. He assumes on each that he has a condition to perform as a precedent to his right to recover compensation. He first says: "I performed it." He next says: "I did not perform it, but was ready to do so, and you hindered me."

The performance of such a condition, and an excuse for not performing it, are matters sō distinct that good pleading requires the certain averment of that one upon which the party relies. They are so treated by Mr. Chitty, he giving the rules that regulate the pleading of a performance of conditions precedent, and also the averments necessary in setting out an excuse of performance by the plaintiff. In regard to the latter he remarks: "In stating an excuse for nonperformance of a condition precedent, the plaintiff must, in general, show that the defendant either prevented the performance or rendered it unnecessary to the prior act by his neglect or by his discharging the plaintiff from performance." Chit. Pl. 326.

But the point involved here is not new. Thus Mr. Gould, citing Co. Litt. 304a, and 1 Sid. 10, says: "If in covenant broken the defendant pleads performance on general terms, and the plaintiff replies nonperformance of a particular act, a rejoinder that the defendant was ready to perform and tendered performance, and that the plaintiff prevented it, is a departure from the plea; performance and tender and refusal

being distinct and inconsistent grounds of defense. The matter rejoined should have been pleaded in the first instance." Gould, Plead. 455.

In the present case the plaintiffs rest their case upon performance of a preceding covenant. In the case mentioned by Mr. Gould the defendant rested his defense upon the performance of his covenant.

In neither case could the parties in a subsequent pleading shift their ground of attack or defense from performance to an excuse for nonperformance.

There should be judgment for the defendant, with costs.[57]

YEATMAN v. CULLEN et al.

(Supreme Court of Indiana, 1839. 5 Blackf. 240.)

BLACKFORD, J. This was an action of debt on a promissory note, brought by an assignee against the makers.

The declaration contains two counts.

[The second count was on a note executed at Cincinnati, Ohio. To this count there were four pleas, viz.: (1) Nil debent; (2) want of consideration; (3) that the note was obtained from defendants by fraud, covin and misrepresentation; (4) that the note was obtained from defendants by certain false representations. The replication to the three special pleas stated that the note was made at Cincinnati, Ohio, and was there indorsed to the plaintiff before it became due, and set out a statute of Ohio, which made such a note negotiable by indorsement. To this replication was filed a general demurrer which the trial court sustained.] [58]

There is one objection to the replication in question, which is fatal to it on general demurrer. That objection is that it is a departure from the second count which it professes to support, and to which the special pleas are pleaded. In that count the plaintiff must be considered as

[57] McAden v. Gibson, 5 Ala. 341, 344 (1843); Warren v. Powers, 5 Conn. 373, 380 (1824); Pollard v. Taylor, 2 Bibb. (Ky.) 234 (1810); Sibley v. Brown, 4 Pick. (Mass.) 137 (1826); Burroughs v. Clarke, 3 Gill (Md.) 196 (1845); Porterfield v. Butler, 47 Miss. 165, 12 Am. Rep. 329 (1872); Tarleton v. Wells, 2 N. H. 306 (1820); Stiers v. Henries, 8 N. J. Law, 364 (1826); Andrus v. Waring, 20 Johns. (N. Y.) 153 (1822); McSherry v. Askew, 1 Yeates (Pa.) 79 (1791); Heath v. Doyle, 18 R. I. 252, 27 Atl. 333 (1893); Ordinary v. Bracey, 1 Brev. (S. C.) 191 (1802); Graham v. Graham, 4 Munf. (Va.) 205 (1814); McGowan v. Caldwell, Fed. Cas. 8806 (1808); Hillier v. Plympton, 1 Str. 422 (1721). Accord.

But a variance between declaration and replication or between plea and rejoinder in an immaterial matter is no ground for objection. Primer v. Philips, 1 Salk. 222 (1695); Webley v. Palmer, 1 Salk. 222-(1696); Thompson v. Fellows, 21 N. H. 425 (1850); Wakeman v. Paulmier, 39 N. J. Law, 340 (1877). Accord. See, also, McMechan v. Hoyt, 16 Ark. 303 (1855); Little v. Blant, 16 Pick. (Mass.) 359, 365 (1835).

[58] This abbreviated statement is substituted for the statement made by the court. Only so much of the opinion as deals with departure is printed.

relying on the statute of this state, because he has brought his action here, and sets out no other law; but in the replication he changes his ground, and relies on the statute of Ohio. That is a departure in pleading. He deserts in his replication the ground, in point of law, on which the second count rested the cause; which is as much a departure, as if he had changed his ground in point of fact. 3 Tho. Co. Litt. 346; 1 Chitt. Pl. 682; Steph. on Pl. 413. The plaintiff should have shown in the second count, as well as in the first, the statute of Ohio under which the note was made. There is the following case on this subject: In covenant against an apprentice on his indenture of apprenticeship, the declaration was in common form (as at common law). Plea, infancy. Replication, the custom of London (under which an infant may bind himself an apprentice). This replication was held to be a departure. 5 Bac. Abr. 449, 450. The replication in that case, says Gould, was a departure, because it abandoned the legal foundation of the suit as laid in the declaration, for another, distinct from and independent of it. The plaintiff should have declared on the custom. Gould on Pl. 454. It is also stated in the books that a declaration or plea, asserting a right at common law, is not fortified by the subsequent allegation of a right created by statute; but that such subsequent allegation is a departure. 5 Bac. Abr., 1 Chitt. Pl., and Gould's Pl., supra.

The demurrer to the replication was, therefore, correctly sustained.[59]

The judgment, however, must be reversed, on account of the error in sustaining the demurrer to the first count.

PER CURIAM. The judgment is reversed, with costs. Cause remanded, etc.

ALLEN v. WATSON.

(Supreme Court of New York, 1819. 16 Johns. 205.)

This was an action of debt, on a bond in the penalty of 500 dollars, dated the 17th of October, 1817, payable on demand to the plaintiff, and conditioned for the performance of the award of three persons therein named, or of any two of them, of all matters in controversy between the parties, and of the costs of all suits commenced, or depending between them, and the costs of the arbitration, so as the award should be made by the arbitrators, or any two of them, in writing, and under seal, ready to be delivered to the parties, on or before the 1st day of January next ensuing the date of the bond. The defendant, after oyer of the bond and condition, pleaded no award. The plaintiff replied, reciting an award made on the 17th of December, 1817,

[59] Wells v. Teall, 5 Blackf. (Ind.) 306 (1840); Harper v. Hampton, 1 Har. & J. (Md.) 453 (1803); Porterfield v. Butler, 47 Miss. 165, 12 Am. Rep. 329 (1872), semble; Bradley v. Johnson, 45 N. J. Law, 487 (1883), semble; Fulmerston v. Stuard, Dyer, 102b (1554). Accord. See, also, Mole v. Wallis, 1 Lev. 81 (1662).

by which it was awarded that all suits between the parties should cease, that each should pay his own costs in those suits, that the defendant should pay to the plaintiff 97 dollars and 40 cents, that mutual releases should be executed, etc.; and the breach assigned is the nonpayment of the money awarded by the arbitrators. The defendant rejoined that after the making of the bond, and before the award was made, or the time for making it had expired, he did, "by a certain writing, obligatory, sealed, etc., revoke and disannul the said bond or writing obligatory executed and delivered by him, the said defendant, to the plaintiff, and all and singular the powers given and granted by him in and by the said bond, or writing obligatory, to the said arbitrators, and this he is ready to verify: wherefore, he prays," etc.

To this rejoinder there was a general demurrer, and the defendant joined in demurrer.

SPENCER, C. J.[60] The points are: 1, Whether the rejoinder is a departure from the plea, and therefore vicious; 2, whether, and how far, the defendant could revoke the authority given to the arbitrators by the bond; and, 3, whether notice of the revocation should not have been averred.

A departure in pleading is where one defence is abandoned or departed from which was first made, and recourse is had to another, and when the second plea contradicts the first plea, and does not contain matter pursuant to it, going to support and fortify it. The principal reason which has conduced to the disallowance of a departure in pleading is to avoid endless prolixity; and it has been well observed that he who has a bad cause would never be brought to issue, if a departure in pleading were allowed, and he who has a good cause would never obtain the end of his suit.

Thus, in Barlow v. Todd, 3 Johns. 367, in debt on an arbitration bond, the defendant pleaded no award; the plaintiff replied setting forth an award; the defendant rejoined impeaching the award, because the arbitrators had not made an award touching one of the items of the plaintiff's claim, which was submitted to the arbitrators; and on demurrer this court held the rejoinder to be a departure, in first pleading no award, and then admitting it; and we said it was an established principle that a rejoinder must maintain the plea, and cannot set forth any matter at variance with it. We also expressed a decided opinion that the matter rejoined would have been inadmissible under any circumstances.

The real point in this case is whether the rejoinder is at variance with the plea, and inconsistent with the allegation that the arbitrators made no award. If it is, then beyond all doubt the rejoinder is vicious; but if it is not, then it is not objectionable as a departure. The rejoinder admits that, in point of fact, the persons chosen as arbitrators made and published an instrument purporting to be an award, but

[60] A portion of the opinion is omitted.

it asserts that the powers conferred on the arbitrators had been revoked by the defendant prior to the making and publishing it. The argument on the part of the defendant is that the instrument purporting to be an award is not so in reality, and that the facts rejoined support the plea, which alleged that the arbitrators had made no award, by showing that all their powers were at an end by the revocation, and that therefore their decision was unauthorized, and does not operate as an award under the bond of submission.

The case of Fisher v. Pimbley, 11 East, 187, bears strongly on this case, and justifies the rejoinder. That was an action of debt, on a bond conditioned to perform an award; plea, no award; replication, stating an award and setting forth a breach; rejoinder, stating the whole award, in which were recited the bonds of submission, whereby it appeared that the award was not warranted by the submission; demurrer to the rejoinder: and it was decided unanimously by the court that the rejoinder was not inconsistent with, nor a departure from, the plea.

Lord Ellenborough proceeded to show that the award was clearly bad; and, being so, he said the only question was whether the defendant could show such award in his rejoinder, consistently with his former allegation in his plea that there was no award. He held that the defendant maintained his former allegation that there was no award; in other words (he observes), that there was no legal and valid award under the submission, which is the same as no award; and Le Blanc and Bayley, Justices, fully assented to this reasoning, on the ground that the rejoinder showed that there was no award conformable to the submission, and therefore no award.

It is true there are several decisions which seem to have a different aspect, as 1 Lev. 85, 245; 1 Wils. 122; 2 Saund. 84 b. and c., and 188. And the case of Praed v. The Dutchess of Cumberland, 4 Term Rep. 585, certainly adopts the contrary doctrine. There an action of debt was brought on an annuity bond; the defendant pleaded no such memorial as the statute required; replication, that there was a memorial, setting it out; rejoinder, that the consideration was untruly alleged by the memorial to be paid to both obligors, and that one of them received no part of it; demurrer thereto. The court held the rejoinder to be a departure, on the ground that that plea tendered an issue of fact, and not in law. Buller, Justice, said, in the case of an award, if there be an award in fact, the party cannot, on the trial of an issue of no award, go into objections to the award, in point of law. A writ of error was brought, on this judgment, to the Exchequer Chamber (2 Hen. Black. 280), and the judgment was affirmed, on the ground that the rejoinder was bad in substance, the court declining to discuss the question of departure, and expressly saying that they gave no opinion upon it.

I confess that, until I examined the case of Fisher and Pimbley, my impressions were that the rejoinder was a departure; but I cannot

resist the solid reasoning of the judges in that case that a void award is no award, and that it is not inconsistent to say that there is no award, and afterwards point out, in a subsequent pleading, facts which conclusively show that what is alleged to be an award is not an award. Here the revocation of the powers of the arbitrators stripped them of all pretence of authority to act as such; and, in the strictest truth, the instrument to which they put their hands and seals was no award under the submission, for the submission itself was at an end. None of the cases cited come up to this. The rejoinders which have been held to be departures do not controvert the power of the arbitrators, but go to impeach the awards for some extrinsic causes; such as not making the award of, and upon the premises submitted, or a refusal to consider and award upon some of the matters submitted; but here the objection strikes at the validity of the award itself, by showing a total absence of power in the persons assuming to make it; and I cannot but consider the Court of Exchequer Chamber declining to decide the question of departure in pleading, as evidence of doubt and hesitation on the point.

[The court then held that the defendant could revoke the powers conferred by the arbitration bond, and that the rejoinder sufficiently alleged notice of such revocation.]

Judgment for the defendant with leave to the plaintiff to amend on payment of costs.[61]

SECTION 17.—NEW ASSIGNMENT

MARTIN v. KESTERTON.

(Court of Common Pleas, 1776. 2 W. Bl. 1089.)

Trespass for breaking and entering and doing damages in several closes of the plaintiff at Lambeth. The defendant demurs, for that the number of closes is not stated or set forth in the declaration, neither are they named or sufficiently described therein, whereby the defendant is unable to collect the supposed cause of action, or make any answer thereto. Joinder in demurrer.

BLACKSTONE, J. I have looked into this matter with some attention: and I conceive that anciently, upon a writ of quare clausum fregit, the plaintiff might (and may still) declare either generally, for

[61] Fowler v. Macomb, 2 Root (Conn.) 388 (1796); Tillis v. Liverpool, etc., Co., 46 Fla. 268, 35 South. 171, 110 Am. St. Rep. 89 (1903); People v. Opera House Co., 249 Ill. 106, 94 N. E. 159 (1911); City of Chicago v. People, 210 Ill. 84, 71 N. E. 816 (1904); Breck v. Blanchard, 22 N. H. 303 (1851); Haley v. McPherson, 3 Humph. (Tenn.) 104 (1842); Virginia, etc., Co. v. Saunders, 86 Va. 969, 11 S. E. 794 (1890); Levy v. Peabody, 10 W. Va. 560, 27 Am. Rep. 598 (1877); Fisher v. Pimbley, 11 East, 187 (1809). Accord.

breaking his close at A., or might name the close in his count, as for breaking and entering his close called Blackacre in A., or might otherwise certainly describe the same. If he declared generally, and the defendant pleaded the general issue, the plaintiff might give evidence of a trespass in any part of the township of A. Heath, Maxims, 12. So that for the advantage of the defendant, and to enforce the plaintiff to ascertain the place exactly, a method was devised of permitting the defendant to plead what is called the common bar, that is, to name any place, as Broomfield (true or false was immaterial) in A., as the place where the supposed trespass happened, and then to allege that such place so named was the defendant's own freehold. And, as the plaintiff could prove no trespass in Broomfield, this drove him to a new assignment of the locus in quo, by naming the place in certain, as a close called Blackacre, to which the defendant was now to plead afresh.[62] And this came to be so much the course that (though it had been held in 9 Edw. 4, 23, 24, that if the plaintiff named the place in certain by his count, he could not afterwards vary from it), yet, in 15 Edw. 4, 23, it was held by Brian and Littleton that it was mere nugation and surplusage for the plaintiff to name the close in his declaration, and that it should not put the defendant out of his usual course of pleading the common bar and giving the close another name; and an amendment (quite contrary to what is now wished) was directed by striking the name out of the plaintiff's declaration. And Brook, abridging this case (Travers, 111), draws from it this general rule, "that a thing put in a declaration, which is not usual, shall not put the other party out of his common course of pleading." And the same is laid down as law in Hob. 16, 10 Jac. 1, "that if the plaintiff in trespass assigns a place, the defendant may plead at another place, without traversing the place assigned by the plaintiff, and then the plaintiff may take a new assignment." Catesby, however, 21 Edw. 4, 18, held the contrary, that if the plaintiff names the place, the defendant shall answer to the place as laid, and shall not give it another name. At length Fairfax, 22 Edw. 4, 17, lays down the rule very clearly, and reconciles the whole by taking this difference: "If the plaintiff gives a name by his writ, the defendant cannot vary from this name. But if the writ be only in general, quare clausum fregit, and the plaintiff gives a name in his count, this shall not bind the defendant, but he may give the plaintiff another name, and change the name he has given. But if the name be in the writ and also in the count, then it cannot be varied from." That is, in short, that upon a general writ, the plaintiff ought not to declare specially; and if he does, the special

[62] Similarly, where defendant has committed more than one violation of plaintiff's right, for one of which he has a justification or excuse, if plaintiff's declaration does not make it clear to which wrong it refers, defendant may plead his justification or excuse, and thus drive plaintiff to a new assignment. Carpenter v. Crane, 5 Blackf. (Ind.) 119 (1839); Scott v. Dixon, 2 Wils. 3 (1753). See, also, Williams v. Spears, 11 Ala. 138, 142 (1847); Smith v. Powers, 13 N. H. 216 (1842); Spencer v. Bemis, 46 Vt. 29 (1873).

name is surplusage. And so it was understood, 5 Hen. 7, 28, Bro. Trespass, 277, "hoc patet that in a general writ of trespass the defendant may give name, but the plaintiff in his count cannot give it a name."

And as it became the practice to sue out only general clausum fregits, and the law was held that upon such general writs the plaintiff either could not at all, or could not to any conclusive effect, count any close in certain, the mode of declaring generally, pleading the common bar, and making a new assignment, seems to have been universally adopted. See Aston, 505, in 11 Eliz., and all Coke's Entries of cases in the Common Pleas; for in the proceedings by bill in the King's Bench the declarations are all of a place certain. But as this practice was circuitous and full of delay, a rule was made in the Common Pleas about the time of Heath, Max. 13 (and he was Chief Justice in Charles the First's time), for the benefit of plaintiffs, to permit them to declare in certain, which was afterwards ingrafted into the code of rules, A. D. 1654, and is clearly only permissive, and not compulsory upon the plaintiff: "The declaration upon an original or bill quare clausum fregit may mention the place certainly, and so prevent the use and necessity of the common bar and new assignment." Section 17. But when the plaintiff has so declared, section 19 is peremptory on the defendant, "that the common bar and new assignment be forborn, where the declaration contains the certainty equivalent to a new assignment." And that it was so understood at the time, and immediately after, appears from the many precedents to be met with in the books of general declarations, with the common bar, and new assignment, subsequent to 1654. As in Lilly, 444, 33 Car. 2; Lutw. 1301, 1372, 1385, 1399, 1467, from 36 Car. 2, to 9 W. 3. For the practicers could not be induced all at once to depart from their ancient forms; though as the new regulations were evidently calculated for the benefit of the plaintiff, by preventing circuity and delay, the old practice gradually wore out; and the last of these general declarations which I have seen (till the present) is in the Common Pleas, 5 Geo. 1. Still, however, the law permits the plaintiff to use this circuity and to delay himself, if he be so advised; and therefore the reporter of Elwis and Lamb, H. 2 Ann. in the King's Bench, 6 Mod. 119, is a little mistaken, or has expressed himself ambiguously in one point, by supposing the rule to be compulsory on the plaintiff, instead of optional. If we read "may" instead of "shall," what he represents the court to have said will be perfectly right. "Now there is a fixed course established in the Common Pleas, that in local actions the plaintiff shall ascertain the place in his declaration, to prevent such general pleas, and the prolixity of a new assignment; and the defendant is confined to the place ascertained in the declaration." Salkeld, in reporting the same case 453, states the manner of declaring to be still optional in the plaintiff. "In trespass quare clausum fregit in D. (i. e., without naming the close), if the defendant plead liberum tenementum, and issue be joined thereon, it is sufficient for the defendant to show any close that is his

freehold.[63] But if the plaintiff gives the close a name, he must prove a freehold in the close named.[64] So adjudged in the Common Pleas and the judgment affirmed in the King's Bench on a writ of error." As, therefore, the plaintiff has a right to declare generally, if he pleases, I think the demurrer is bad.[65]

Glyn, for the defendant, perceiving the opinion of the majority of the Court to be against his client, moved for leave to withdraw his demurrer, without payment of costs; and to plead not guilty and a tender of amends. * * *

Rule absolute, on payment of costs.[66]

DITCHAM v. BOND.

(Court of King's Bench, 1813. 3 Campb. 524.)

Trespass for breaking and entering the plaintiff's dwelling house, and making a great noise and disturbance therein, etc., and for assaulting and beating him and his servant.

The defendant pleaded to breaking and entering the house a license, with other pleas to the rest of the declaration.

Replication to all the pleas, de injuria, etc.

It appeared that the plaintiff keeps several billiard tables in his house, at which all persons may play, paying certain regulated prices by the game or hour. There is no board or sign on the outside of his house, stating that billiard tables are kept there; but the outer door always remains open, and gentlemen walk upstairs to the billiard rooms, if any happen to be disengaged, or if not, they wait in a parlour below. On the 18th of May the defendant entered the house, and insisted on walking up stairs to the billiard rooms, although they were all engaged, struck the plaintiff, who wished to prevent him, and made a great disturbance in the house for a considerable while after.

It was insisted for the defendant that he was entitled to a verdict on the plea of licence, as the plaintiff must be supposed to have consented to all persons entering the house for the purpose of playing at billiards. The defendant might have been guilty of some excess; but that could not be taken advantage of for want of a new assignment.

On the other side it was contended that the keeping of billiard tables under these circumstances was no evidence of licence, and that

[63] Marks v. Madsen, 261 Ill. 51, 103 N. E. 625 (1913); Tribble v. Frame, 7 T. B. Mon. (Ky.) 529 (1824); Ellet v. Pullen, 12 N. J. Law, 357 (1831); Austin v. Morse, 8 Wend. (N. Y.) 476 (1832), semble; Goodright v. Rich, 7 D. & E. 327, 335 (1797), semble. Accord. Anon. Dyer, 23b. Contra. See note 9 Ill. Law Rev. 46.

[64] Cocker v. Crompton, 1 B. & C. 489 (1823); Cooke v. Jackson, 9 D. & R. 495 (1827); Lempriere v. Humphrey, 3 A. & E. 181 (1835). Accord.

[65] Palmer v. Tuttle, 39 N. H. 486 (1859). Accord.

[66] The opinions of Gould and Nares, JJ., are omitted.

at any rate the defendant by his subsequent conduct had made himself a trespasser ab initio.

Lord ELLENBOROUGH. I think the plaintiff was bound to new-assign. The keeping of a billiard table amounts to a licence given by the party. The distinction is taken in the Six Carpenters' Case, 8 Rep. 146, between a licence given by the party and a licence given by the law. If the defendant exceeds the latter, as by committing a trespass in an inn, he is a trespasser ab initio; but an excess of the former must be taken advantage of by new assignment.[67]

The plaintiff had a verdict, with £5 damages for the assault upon himself and his servant.

HALL v. MIDDLETON.

(Court of King's Bench, 1835. 4 Adol. & E. 107.)

Assumpsit for money lent, and on an account stated. Pleas, to the first count, payment; to the second, non assumpsit, on which issue was joined. Replication to the first plea, that plaintiff sued, not for the nonperformance of the premises in the first plea mentioned, and in full satisfaction and discharge whereof defendant paid plaintiff the sum in that plea mentioned, but for the nonperformance of another and different promise made by defendant to plaintiff in manner and form as in the first count mentioned. Verification. Rejoinder, non assumpsit: and issue thereon. The cause was tried at Chesterfield, on the 1st of December, 1834, before the undersheriff of Derbyshire, on whose notes, produced as after mentioned, the following facts appeared. The plaintiff claimed £15 for money lent in August, 1833. A witness proved for the plaintiff that, in October, 1833, the defendant

[67] Spades v. Murray, 2 Ind. App. 401, 28 N. E. 709 (1891); Bowen v. Parry, 1 C. & P. 394 (1824); Penn v. Ward, 2 Cr. M. & R. 338 (1835); Oakes v. Wood, 3 M. & W. 150 (1837). Accord. Ayres v. Keiley, 11 Ill. 17 (1849); Hannen v. Edes, 15 Mass. 347 (1819); Curtis v. Carson, 2 N. H. 539 (1823); Bennett v. Appleton, 25 Wend. (N. Y.) 371 (1841); Elliot v. Kilburn, 2 Vt. 470 (1855). Contra.

Where the excess makes defendant a trespasser ab initio, the replication should set forth the facts, but it should not be, strictly, a new assignment. Lincoln v. McLaughlin, 74 Ill. 11, 13 (1874), semble; Oystead v. Shed, 12 Mass. 506, 508 (1815), semble; Great Falls Co. v. Worster, 15 N. H. 412, 440 (1844), semble; Hubbell v. Wheeler, 2 Aikens (Vt.) 359, 362 (1827), semble.

Defendant in his plea need not answer matters of aggravation; if plaintiff intends to rely on them, he must new-assign. McConnel v. Kibbe, 33 Ill. 175, 85 Am. Dec. 265 (1864); Rasor v. Qualls, 4 Blackf. (Ind.) 286, 30 Am. Dec. 658 (1836); Yingling v. Hoppe, 9 Gill. (Md.) 310 (1850); Grout v. Knapp, 40 Vt. 163 (1868); Taylor v. Cole, 3 D. & E. 292 (1789); Monprivatt v. Smith, 2 Camph. 175 (1809); Webber v. Sparkes, 10 Mees. & W. 485 (1842). But if it is apparent that the matter is not intended as aggravation, but as part of the gist of the action, no new assignment is required. Thayer v. Sherlock, 4 Mich. 173 (1856); Vreeland v. Berry et al., 21 N. J. Law, 183 (1847); Perry v. Carr, 42 Vt. 50 (1869); Carpenter v. Barber, 44 Vt. 441 (1872); Bush v. Parker, 1 Bing. N. C. 72 (1834); Phillips v. Howgate, 5 B. & Ald. 220 (1821).

acknowledged owing the plaintiff £15 for money borrowed, and that, in February, 1834, on being asked why he had not paid the plaintiff the £15 he owed him, the defendant answered that he had paid it when his uncle's affairs were settled. Another witness proved that, on the occasion alluded to, no such settlement took place. For the defendant, a witness stated that, in the latter end of October, 1833, the plaintiff called on the defendant, and asked him for £15, which the defendant paid, with 4s. 6d. for the loan, and the plaintiff said, "it would make it right of all accounts." The plaintiff had a verdict for £15 and interest. The defendant's solicitor, after the verdict had been given, requested the undersheriff to put to the jury whether there were two sums of £15 lent, or whether there was any other sum lent than that mentioned in the first count of the declaration; but the undersheriff refused. Maule, in Hilary term, 1835, obtained a rule, on production of the undersheriff's notes, and on affidavits, to show cause why there should not be a new trial, or a verdict entered for the defendant, on the ground that the undersheriff had improperly refused to put the above question, which was stated, on affidavit, to have been suggested immediately on the close of the summing up, and likewise (which also appeared by affidavit only) that the undersheriff had merely put it to the jury whether the £15 said to have been lent to the defendant by the plaintiff in August, 1833, had been so lent.

W. H. Watson now showed cause. The court will give credit to the undersheriff's notes, as to the facts stated in them, rather than to the affidavits. It is true that, where there is a new assignment, the plaintiff must show that there was a second trespass, or, in a case like the present, a second debt. Here the plaintiff proved a debt. It did not appear in evidence that there was any other. But the defendant, instead of taking this objection when the plaintiff had closed his case, called witnesses for the purpose of establishing a payment applicable to the debt which had been proved. Failing to do so, he changes his course, and contends that the question which ought to have gone to the jury was, whether or not two debts had existed. But, after having virtually admitted that there were two debts, and rested his defence upon a payment of the debt newly assigned, he cannot come to the court, alleging that he took a wrong point at the trial, and claiming their interference to set him right. In Pratt v. Groome, 15 East, 235, it appeared, affirmatively, by the plaintiff's case, that only one place was in question; and, in the same manner, in Oakley v. Davis, 16 East, 82, that there was only one arrest really complained of. [PATTESON, J. The defendant here was not at liberty to prove payment of the debt newly assigned, not having rejoined payment of it. The evidence of payment must have been given to identify the debt spoken of by the plaintiff's witnesses, with that of which payment had been pleaded.]

Maule, contra. The question raised on the record was whether there were two debts or only one; and that ought to have gone to the jury.

The evidence of payment was given to identify the debt paid with that first pleaded to. (He was then stopped by the court.)

Lord DENMAN, C. J. We agree in the view taken on the defendant's part. The only issue was, whether or not there was a second debt. Any question as to payment of that debt was immaterial.

PATTESON, J. The rule must be absolute for a new trial, as there was some evidence of a second debt. If there had been no such evidence at all, the defendant would have been entitled to have a nonsuit entered.

WILLIAMS and COLERIDGE, JJ., concurred.

Rule absolute for a new trial.[68]

SECTION 18.—ANTICIPATORY ALLEGATIONS

WALKER, Attorney General, v. MICHIGAN STATE BANK.

(Supreme Court of Michigan. 1846. 2 Doug. 359.)

To an information in the nature of a quo warranto, charging defendants with using without warrant the franchise of being a body politic and corporate, defendants pleaded an act of the legislative council of the state constituting defendants a body politic and corporate, and set out facts showing several transactions with the state, which facts the Attorney General moved to strike out as surplusage.[69]

WHIPPLE, J. * * * A motion was made by the Attorney General to strike out as surplusage all that part of the plea relating to the condition of the bank in the years 1838 and 1839, the negotiation and settlement with the state, and the several acts of the legisla-

[68] Boynton v. Willard, 10 Pick. (Mass.) 166 (1830); Davidson v. Schenck, 31 N. J. Law, 174 (1865); Freeston v. Crouch, Cro. Eliz. 492 (1596); Oakley v. Davis, 16 East, 82 (1812); Wilmshurst v. Bowker, 5 Bing. N. C. 541 (1839). Accord.

"These facts are all averred in the plea, and are not traversed; and the effect of the new assignment is not strictly to admit the truth of these facts, but to withdraw them entirely from consideration as the subject of the action, and to preclude the plaintiff from complaining of them; and the true grounds of complaint are to be sought in the explanation of the declaration contained in the new assignment." Parke, B., in Pand v. Kingscote, 6 Mees. & W. 174, at 197 (1840). See, also, 1 Wm's. Saund. 299a, note f; Dana v. Bryant, 1 Gilman (6 Ill.) 104 (1844); Bartlett v. Prescott, 41 N. H. 493 (1860).

To a plea of payment a new assignment is not necessary. Freeman v. Crafts, 4 Mees. & W. 4 (1838); James v. Lingham, 5 Bing. N. C. 553 (1839); Moses v. Levy, 4 A. & E. (N. S.) 213 (1843).

[69] This short statement is substituted for the statement contained in the original opinion. The portion of the opinion dealing with the presumption of continued corporate existence down to the time of the usurpation alleged in the information is omitted.

ture in relation to such settlement, and the history of the several suits instituted by and against the bank, etc.

If that portion of the plea to which exception is taken is mere surplusage, the motion is appropriate. Whether the motion is well founded or not must depend upon the application to the matter objected to as surplusage of a few elementary rules of pleading. "It is not necessary in pleading to state matter which would come more properly from the other side." Steph. Pl. 350. The true meaning of the rule is "that it is not necessary to anticipate the answer of the adversary, which, according to Lord Hale, is like leaping before one comes to the stile." It is sufficient, says the same author, that each pleading should in itself contain a good prima facie case, without reference to possible objections not yet urged. Gould thus states the rule: "In general, it is not necessary for either party to allege more than will constitute, prima facie, a sufficient cause of action or defence. It is therefore, in general, unnecessary for a party to deny, or avoid by anticipation, all or any of the possible facts which might furnish sufficient answers in law to his own allegations." Gould's Pl. 167. The same rule is affirmed by Chitty, who says that, "in general, whatever circumstances are necessary to constitute the cause of complaint, or ground of defence, must be stated in the pleadings, and all beyond is surplusage." 1 Chitty's Pl. 246. This rule, like all others in the law of pleading, is founded in sound logic; and, in practice, it is both reasonable and convenient, as a contrary practice would lead to confusion and prolixity. Illustrations of the rule are to be found in the examples given in the elementary works from which I have quoted, and numerous adjudicated cases might be cited to show its extent and application. Let us apply the rule to the case before us. The information alleges that the defendants have used, without any warrant, certain liberties, privileges and franchises. The defendants answer by setting out a charter, by which they are warranted in using the liberties, privileges and franchises they are charged with having usurped. Does this constitute a good prima facie defence to the information, without reference to the other matters set out in the plea? This question may be tested by supposing a general demurrer to be interposed to the plea; the demurrer would admit the truth of the matter pleaded, and the judgment of the court cannot be doubted; the defence would be regarded as perfect and conclusive. The same result would follow if issue were taken upon the plea, and the same facts proved on the trial of the issue, which would be admitted if a demurrer were interposed. The only possible purpose of the other allegations in the plea must be either; 1st, to show that the state is estopped from insisting upon any cause of forfeiture, which might have accrued anterior to the acts of the legislature referred to in the plea, and the contracts therein stated to have been made between the state and the bank; or, 2d, to show a continued corporate existence down to the time of the usurpation alleged in the information.

That the plea cannot be sustained on the first ground seems to me very clear from what has already been stated. It is anticipating matter which should properly come from the other side, and thus involves a violation of a fundamental rule of pleading. The charter would prove that the corporation was legally created, and the law will intend that it performed all its duties. Besides, it is making an issue when no issue is tendered. The plea not only avers matter which if true would constitute a full answer to the information, but purports also to answer matters not averred in the information; in other words, it presumes that the Attorney General will insist upon a forfeiture of the charter by the corporators, for causes arising anterior to a certain period; and the object of setting out the acts of the legislature, and the contracts before referred to, is to answer such a supposed state of facts. But I have said that this court will intend that the defendants have performed all their duties until the contrary be shown. People v. President, etc., of Manhattan Co., 9 Wend. (N. Y.) 379. We cannot presume that the defendants have done any acts which will involve a forfeiture of chartered rights, or draw down upon them the infliction of a heavy penalty. It may be that the Attorney General will not reply facts which, if found true, would constitute a ground of forfeiture; or if a forfeiture is urged, it may be for causes occurring subsequent to the acts and contracts spread out in the plea; in such a case the matter objected to would be inapplicable, as it purports to be an answer to causes of forfeiture arising anterior to these acts and contracts. This reasoning illustrates the propriety of the rule I am seeking to enforce; it shows that the portion of the plea which we are called upon to reject as surplusage might be good or bad, according to circumstances. Whether it be good or bad we will determine when the Attorney General alleges upon the record causes of forfeiture to which the plea would be a legal answer. * * *

Upon the whole, we are of opinion that the motion of the Attorney General must be granted.[70]

JOLIET STEEL CO. v. SHIELDS.

(Supreme Court of Illinois, 1890. 134 Ill. 209, 25 N. E. 569.)

Action on the case. The declaration contained two counts, in each of which plaintiff alleged that at the time of the accident complained of he was engaged as servant of the defendant in repairing defendant's railroad track, and that defendant, by its servants, negligently placed a certain mold in an insecure and dangerous position near said track, and that said mold fell and injured plaintiff. Defendant pleaded not guilty. Verdict was rendered for plaintiff. Defendant's motion in

[70] Sir Ralph Bovy's Case, 1 Ventr. 217 (1673); 31 Cyc. 109; 21 Encyc. Pl. & Pr. 293, and cases cited. Accord.

arrest of judgment was denied, and judgment was entered upon the verdict. Defendant appealed to the Appellate Court, which affirmed the judgment. Defendant then appealed to the Supreme Court.[71]

SCHOLFIELD, J. The rule in this state is, where one servant is injured by the negligence of his fellow servant, their duties being such as to bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution, and the master is guilty of no negligence in employing the servant causing the injury, the master is not liable. Stafford v. Railroad Co., 114 Ill. 244, 2 N. E. 185; Railway Co. v. Moranda, 93 Ill. 302, 34 Am. Rep. 168; Railroad Co. v. Geary, 110 Ill. 383; Railway Co. v. Snyder, 128 Ill. 655, 21 N. E. 520; Rolling Mill Co. v. Johnson, 114 Ill. 57, 29 N. E. 186; Railroad Co. v. Hoyt, 122 Ill. 369, 12 N. E. 225. It follows, and is recognized by these cases, that where one servant is injured by the negligence of another servant of the common master, but not within this description of fellow servant, the master is liable. See, also, Railroad Co. v. May, 108 Ill. 288; Railway Co. v. Snyder, 117 Ill. 376, 7 N. E. 604; Railroad Co. v. Kelly, 127 Ill. 638, 21 N. E. 203.

In all actions for negligence, the burden is upon the plaintiff to allege and prove such negligent acts of the defendant as will entitle the plaintiff to recover. Railroad Co. v. Harwood, 90 Ill. 425; Railroad Co. v. Gregory, 58 Ill. 272; Blanchard v. Railway Co., 126 Ill. 416, 18 N. E. 799, 9 Am. St. Rep. 630; Patt. Ry. Acc. Law, § 373, and cases cited in note. The words "defendant's servants" clearly include any and all of defendant's servants, and so, necessarily, it is not sufficient here merely to allege and prove an injury to the plaintiff from the negligence of the defendant's servants generally, for it is just as consistent with that allegation and proof that the defendant is free of liability as that it is liable. The omission to allege that the defendant's servants causing the plaintiff's injury were not the fellow-servants of the plaintiff, within the description of such servants, supra, was not cured by verdict, because the denial of the allegations of the declaration imposed no duty upon the plaintiff in that respect. When he had proved that he was injured by the negligence of the defendant's servants, he had proved all that he had alleged. But, since the defendant was not liable merely because the plaintiff was injured by the negligence of the defendant's servants, he was entitled to contest and disprove that its servants, by whose negligence the plaintiff was injured, were such servants as rendered it liable to the plaintiff for their negligence.

The rule being that nothing will be presumed after verdict, but what must have been necessarily proved under the averments of the declaration, the court erred in overruling the motion in arrest. Chichester v. Vass, 1 Call (Va.) 83, 1 Am. Dec. 509; Bartlett v. Crozier, 17 Johns. (N. Y.) 457, 8 Am. Dec. 428. * * *

[71] This short statement is substituted for that given in the original report. A portion of the opinion is omitted.

For the error indicated, the judgments below are reversed, and the cause is remanded to the circuit court, with leave to the plaintiff, if he shall be so advised, to amend his declaration, and for a trial thereafter de novo.[72]

WALL v. CHESAPEAKE & OHIO R. CO.

(Supreme Court of Illinois, 1902. 200 Ill. 66, 65 N. E. 632.)

WILKIN, J. This suit was begun by plaintiff in error to recover damages for occasioning the death of her intestate, as it is alleged, by reason of the negligence of the defendant in error. To a second amended declaration containing 12 counts, filed on January 5, 1900, the court sustained a general demurrer; and plaintiff having elected to stand by her declaration as amended, and judgment for costs having been rendered against her, she appealed to the appellate court for the First district, where the judgment below was affirmed, and the case is brought to this court upon writ of error.

The question is one of pleading. Plaintiff in error insists that the court erred in sustaining the demurrer. The first four counts of the declaration are alike, except the allegations as to the place where the injury was received, and they allege, in substance, that the deceased, on May 24, 1896, while accompanying a train carrying live stock and passing through the city of Cincinnati, and while he was riding on the top of one of the cars, there being no other safe place provided by the company for him to ride, was struck by a bridge or viaduct which crossed over the track, and was greatly injured, resulting in his death. The negligence averred is that the defendant failed to furnish him a safe place in which to ride while caring for the live stock, and failed to warn him of the danger he incurred in so riding in the place provided for him to ride, namely, on the top of the cars.

From the face of the declaration it appears that more than two years elapsed from the time of the injury to the bringing of the suit, and it is insisted by defendant in error that therefore the action could not be sustained, and hence the defense of the statute of limitations could be made by demurrer. Mainly on this ground it is insisted the trial court properly sustained the demurrer. In equity, where it appears on the face of the bill that the cause of action is barred by laches or the statute of limitations, the defect may be reached by demurrer to the bill. But the rule is otherwise in common-law pleading. The defendant cannot demur to a declaration even where it appears on its face that the limitation prescribed by the statute has expired, because the plain-

[72] Watters v. De La Matter, 109 Ill. App. 334, 336 (1903); Lundquist v. Child, 182 Ill. App. 585 (1913); Haskins v. Ralston, 69 Mich. 63, 67, 37 N. W. 45, 13 Am. St. Rep. 376 (1888); Royce v. Oakes, 20 R. I. 252, 38 Atl. 371 (1897); Winchester v. Carroll, 99 Va. 727, 738, 40 S. E. 37 (1901) (semble); Berns v. Gaston, etc., Co., 27 W. Va. 285, 290, 55 Am. Rep. 304 (1885), semble. Accord.

tiff would thus be deprived of the opportunity of replying and pleading any matter which would prevent the bar from attaching. The defendant must plead the statute if he wishes to avail himself of it. Gunton v. Hughes, 181 Ill. 132, 54 N. E. 895. The demurrer to the first four counts was therefore improperly sustained.[73]

Counsel concede that under our practice the bar of the statute of limitations cannot be availed of by demurrer, but, on the contrary, admit that the statute must be pleaded, for the reason that when pleaded the plaintiff is thereby afforded an opportunity of replying that the case is within some exception to the statute; but it is insisted that the bringing of the action within two years after the date of the injury is a condition precedent, and not a limitation. This contention is not well taken. The bringing of the action within two years may or may not be a condition precedent upon which the plaintiff can recover. Each case must depend upon its peculiar facts, and the plaintiff, as before said, should be given an opportunity to set up those facts if they form an exception to the statute.

Other counts in the declaration under consideration allege matters in avoidance of the statute of limitations, and this manner of pleading is contrary to the established rules and precedents. As is said in Gunton v. Hughes, supra: "It follows, as a logical sequence, that the plaintiff cannot avail himself of matter in avoidance of the statute by pleading such matter in his declaration before the statute has been set up as a bar by plea." Such counts would be objectionable under special demurrer, but the demurrer under consideration is general only.

Counsel for defendant in error raise other objections to the plaintiff's declaration, but they are technical, and, in our opinion, immaterial.

We think the trial court, for the reasons stated, erred in sustaining the general demurrer to the plaintiff's declaration. The judgments of the appellate and circuit courts will be reversed, and the cause remanded to the circuit court. Reversed and remanded.

[73] Punta Gorda Bank v. State Bank, 52 Fla. 399, 42 South. 846 (1906); Renackowsky v. Board of Water Commissioners, 122 Mich. 613, 81 N. W. 581 (1900); Callan v. Bodine, 81 N. J. Law, 240, 79 Atl. 1057 (1911); Stile v. Finch, Cro. Car. 381 (1635); 2 Wm's. Saund. 62c, note 6; 13 Ency. Pl. & Pr. 200; 25 Cyc. 1394. Accord. Cf. Dowell v. Cox, 108 Va. 460, 62 S. E. 272 (1908).

SMITH v. WHITAKER.

(Supreme Court of Illinois, 1849. 11 Ill. 417.)

This was an action in debt upon an appeal bond, given before a justice of the peace, brought by Whitaker against Smith in the Hancock Circuit Court. The declaration recited the bond at length. The defendant pleaded: First, non est factum; second, that there is not any record of said supposed recovery upon the trial of said appeal; and, third, that there is not any record of the said supposed judgment rendered by the said justice remaining on the docket of the said justice in his court, in manner and form as recited in the condition of the said writing obligatory. On the first and second pleas issue was joined. To the third plea plaintiff replied that defendant, on the 28th day of January, 1841, made his said writing obligatory, sealed with his seal, etc., and made profert thereof. To this replication defendant demurred, and demurrer overruled.

The cause was submitted to the court for trial, Purple, judge, presiding, at November term, 1847. A judgment was rendered for the plaintiff below, for the sum of $250 debt, to be satisfied by the payment of $171.17, the damages found, and costs of suit. The defendant below sued out this writ and assigned the errors.

TREAT, C. J.[74] First. Was the demurrer properly sustained to the third plea? The plea alleges, in substance, that there was no such judgment before the justice, as is recited in the condition of the bond sued on. The defendant was estopped by the record from making such an allegation. The bond is set out in the declaration, and it distinctly states that a judgment had been rendered by the justice. The very object of the parties in executing the bond was to prevent the collection of the judgment and have the case reheard in the Circuit Court; and the bond was expressly conditioned for the payment of the judgment, in the event it should be affirmed. It was, therefore, a solemn admission by the defendant that there was such a judgment. He voluntarily entered into an engagement, under his hand and seal, for the payment of the judgment; and he could not afterwards deny what he thus deliberately asserted to be true—the existence of the judgment. The principle of estoppel is clearly applicable. The fact which concluded the defendant from making the denial appeared on the face of the declaration; and the estoppel was rightly insisted on by demurrer. Where the matter which operates as an estoppel appears in the declaration, the plaintiff may demur to a plea by which the defendant attempts to set up the same matter as a defence. But if the matter of estoppel does not appear on the face of the declaration, the plaintiff must, by a replication to the plea, expressly show such matter, and rely thereon. The following authorities abundantly show

[74] A portion of the opinion is omitted.

that the doctrine of estoppel applies in this case, and that the estoppel was properly raised by the demurrer: 1 Chitty's Pl. 634, 635; Rainsford v. Smith, Dyer, 196, a; Kemp v. Goodall, 2 Lord Raymond, 1154; Palmer v. Elkins, ibid, 1554; Lainson v. Tremere, 1 Adolphus & Ellis, 792; Bowman v. Taylor, 2 ibid, 278; Trimble v. State, 4 Blackf. (Ind.) 435. * * *[75]

Judgment affirmed.

[75] But if the plaintiff, instead of relying upon the estoppel, takes issue upon the fact, the jury may find the truth, notwithstanding the fact that the estoppel appears upon the record. Bartholomew v. Candee, 14 Pick. (Mass.) 167 (1833).

CHAPTER II

CONCERNING FORM

SECTION 1.—COMMENCEMENTS AND CONCLUSIONS

COMMENCEMENT OF DECLARATIONS.

(Chitty, Pleading [Am. Ed. of 1809] *285 et seq.)

What is termed the commencement of the declaration follows the venue in the margin, and precedes the more circumstantial statement of the cause of action. It contains a statement: 1st, of the names of the parties to the suit, and if they sue or be sued in another right, or in a political capacity (as executors, assignees, or qui tam, etc.) of the character or right in respect of which they are parties to the suit; 2dly, of the mode in which the defendant has been brought into court; and, 3dly, a brief recital of the form of action to be proceeded in. It is obvious that, independently of express regulation or precedent, some introduction to the substantial statement of the cause of action would be necessary, and the commencement adopted in practice is useful, as pointing out that the defendant is duly in court to answer the complaint, and concisely intimating the character in which the parties sue or are sued, and the nature of the action, by which the parties interested in the pleadings are enabled more readily to direct their attention to the subsequent parts of the declaration. * * *

In the Exchequer the commencement, after stating the title of the court and term, runs thus: "To wit, A. B., a debtor of our Lord the King, cometh before the Barons of his Majesty's Exchequer, on ———, the ——— day of ——— (the return day of the process), in this same term, by E. F., his attorney, and complains by bill against C. D., present here in court the same day, of a plea of trespass on the case, etc. For that whereas," etc.

In suits by infants, or by or against assignees, executors, attornies, etc., the commencement varies from the above forms. Infants are stated to sue by guardian, or prochein ami. The representative character of assignees and executors, should be stated in the commencement, though it will suffice if it appear in the other parts of the declaration; and in actions of debt by or against executors or administrators, in that character, the words "owes to" must be omitted in the commencement; but assignees of a bankrupt may sue in the debet and detinet; an executor de son tort is stated to be executor of the last will and testament of the deceased, the same as against a

rightful executor; in actions by or against attornies, peers, and members of parliament, their privilege as such is stated in the introduction; the various forms are so numerous that I have here only mentioned those which most frequently occur in practice.[1]

CONCLUSION OF DECLARATION.

(Chitty, Pleading [Am. Ed. of 1809] *399 et seq.)

In point of form the usual conclusion in the King's Bench "is to the damage of the said A. B. of £———, and therefore he brings his suit," etc. In the Common Pleas, the conclusion is, "Wherefore the said A. B. saith that he is injured and hath sustained damage to the value (or 'amount') of £———, and therefore he brings his suit," etc. In the Exchequer the form runs, "To the damage of the said A. B. of £———, whereby he is the less able to satisfy our said lord the king the debts which he owes his said majesty at his Exchequer, and therefore he brings his suit," etc. By the above words "suit" or "secta" (a sequendo) were anciently understood the witnesses or followers of the plaintiff, for in former times the law would not put the defendant to the trouble of answering the charge till the plaintiff had made out at least a probable case. But the actual production of the suit, the secta or followers is now antiquated, though the form of it still continues. In actions against attorneys and other officers of the court, the declaration should conclude unde petit remedium instead of bringing suit; but an inaccurate conclusion in this case is no cause of demurrer; however in one case on a special demurrer the court for the sake of keeping up the old established form of "prays relief," etc., proposed an amendment without payment of costs. When the action is by bill against a member of the house of commons, the bill concludes with a prayer of process to be made to the plaintiff, according to the statute, etc.,

In an action at the suit of an executor or administrator, immediately after the conclusion to the damage, etc., and before the pledges, a profert of the letters testamentary, or letters of administration should be made; but in scire facias the profert may be either in the middle or at the end of the declaration; and in an action on a note indorsed to the plaintiff by an administrator, no profert is necessary, because the plaintiff is not entitled to the custody of the letters of administration, which, however, must be proved on the trial; and the omission of the profert is now aided, unless the defendant demur specially for the defect.

[1] For examples of commencements of declarations in the various forms of action in the King's Bench, in Common Pleas, and in the courts in this country, see parts I and II, supra, pp. 25 et seq., 61 et seq., 88 et seq. 195, 226, 288 et seq., 314, 370 et seq.

COMMENCEMENT AND CONCLUSION OF PLEAS AND SUBSEQUENT PLEADINGS.

(Stephen, Pleading [Williston's Ed.] *433–*440.)

Pleadings should have their proper formal commencements and conclusions.

This rule refers to certain formulæ occurring at the *commencement* of pleadings subsequent to the declaration, and to others occurring at the *conclusion*.[2]

A formula of the latter kind, inasmuch as it prays the judgment of the court for the party pleading, is often denominated the *prayer of judgment*.

A PLEA TO THE JURISDICTION has usually no *commencement* of the kind in question. *Its conclusion is as follows:*

* * * the defendant prays judgment, if the court of our Lady the Queen here will or ought to have further cognizance of the plea aforesaid.

Or (in some cases) thus:

* * * the defendant prays judgment if he ought to be compelled to answer to the said plea here in court.

A PLEA IN SUSPENSION seems also to be in general pleaded without formal *commencement*. Its *conclusion* is thus:

* * * the defendant prays that the suit may remain or be respited without day until, etc.

A PLEA IN ABATEMENT is also usually pleaded without a formal *commencement* within the meaning of this rule. The *conclusion* is thus:

In case of plea founded on objection to the frame of the original writ (in real or mixed) or the declaration (in personal) actions:

* * * prays judgment of the said writ (or declaration), and that the same may be quashed.

In case of plea founded on the disability of the party:

* * * prays judgment if the plaintiff ought to be answered to his said declaration.

A PLEA IN BAR, until the change of practice introduced by a recent rule of Hil. T. 4 W. IV, had this *commencement:*

* * * says that said plaintiff ought not to have or maintain his aforesaid action against him the said defendant, because he says, etc.

This formula is commonly called *actio non.*

The *conclusion* was:

* * * prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him.

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[2] For examples of commencements and conclusions of pleas in bar, see parts I and II, pp. 32, 33, 66, 67, 176, 229–231, 337, 386, supra.

But as these expressions were, from the great comparative frequency of pleas in bar, of almost continual occurrence, it was thought desirable, for the sake of brevity, to abandon altogether the use of formulæ which led to so much reiteration; and by the rule of court just mentioned it was accordingly provided that in future it should not be necessary, where the plea is pleaded *in bar of the whole action generally,* to use any allegation of *actionem non,* or any *prayer of judgment,* but that a plea pleaded without such formal parts shall nevertheless be taken as pleaded in bar of the action.

A REPLICATION TO A PLEA TO THE JURISDICTION has this *commencement:*

* * * says that, notwithstanding anything by the defendant above alleged, the court of our Lady the Queen here ought not to be precluded from having further cognisance of the plea aforesaid, because he says, etc.

Or this:

* * * says that the defendant ought to answer to the said plea here in court, because he says, etc.

And this *conclusion:*

* * * wherefore he prays judgment, and that the court here may take cognisance of the plea aforesaid, and that the defendant may answer over, etc.

A REPLICATION TO A PLEA IN SUSPENSION should, probably, have this *commencement:*

* * * says that, notwithstanding anything by the defendant above alleged, the suit ought not to stay or be respited, because he says, etc.

And this *conclusion*:

* * * wherefore he prays judgment if the suit ought to stay or be respited, and that the defendant may answer over.

A REPLICATION TO A PLEA IN ABATEMENT has this *commencement:*

Where the plea was founded on objection to the declaration:

* * * says that his said declaration, by reason of anything in the said plea alleged, ought not to be quashed; because he says, etc.

Where the plea was founded on the disability of the party:

* * * says that, notwithstanding anything in the said plea alleged, he, the plaintiff, ought to be answered to his said declaration, because he says, etc.

The *conclusion* in most cases is thus:

In the former kind of plea:

* * * wherefore he prays judgment, and that the said declaration may be adjudged good, and that the defendant may answer over, etc.

In the latter:

* * * wherefore he prays judgment, and that the said defendant may answer over, etc.

A REPLICATION TO A PLEA IN BAR, before the rule of court of Hil. 4 Will. IV, above mentioned, had this *commencement:*

* * * says that, by reason of anything in the said plea alleged, he ought not to be barred from having and maintaining his aforesaid action against him the defendant, because he says, etc.

This formula is commonly called *precludi non.*

The *conclusion* was thus:

In *Debt:*

* * * wherefore he prays judgment and his debt aforesaid, together with his damages by him sustained, by reason of the detention thereof, to be adjudged to him.

In *Covenant:*

* * * wherefore he prays judgment, and his damages by him sustained by reason of the said breach of contract, to be adjudged to him.

In *Trespass:*

* * * wherefore he prays judgment, and his damages by him sustained by reason of the committing of the said trespasses, to be adjudged to him.

In *Trespass on the case, in Assumpsit:*

* * * wherefore he prays judgment, and his damages by him sustained by reason of the not performing of the said several promises and undertakings to be adjudged to him.

In *Trespass on the case, in general:*

* * * wherefore he prays judgment and his damages by him sustained, by reason of the committing of the said several grievances, to be adjudged to him.

And in all *other actions* the replication, in like manner, concluded with a prayer of judgment for damages, or other appropriate redress, according to the nature of the action.

But the rule of Hil. 4 W. IV, provides that no allegation of *actionem non,* or *precludi non,* or *prayer of judgment,* shall in future be necessary in any pleading subsequent upon a plea pleaded *in bar of the whole action generally,* but that every replication or subsequent pleading, pleaded without these formulæ, shall nevertheless be taken as in bar or maintenance respectively of the action.

With respect to PLEADINGS SUBSEQUENT TO THE REPLICATION, it will be sufficient to observe in general that those on the part of the defendant commence and conclude like the plea; those on the part of the plaintiff, like the replication.

BAILY v. SMITH.

(Supreme Court of Errors of Connecticut, 1791. 1 Root, 243.)

Action of ejectment for five rods of land and a house, to which a special plea in bar was given.

The plaintiff replied and affirmed new matter inconsistent with the title set up by the defendant, and traversed a part of the facts set forth by the defendant to make out his title, and concluded with a verification.

The defendant demurred specially, and for cause assigned, that the plaintiff ought to have concluded to the country.

Judgment: The replication sufficient. Where no new matter is re-

plied, and the traverse goes to all the facts alleged in the plea, it is regular and well to conclude to the country. For in that case a perfect issue is formed. But where new matter is replied, or the traverse does not go to all the facts in the plea, the reply ought to conclude with a verification, to give the other party an opportunity to answer the new matter, or to demur for want of a sufficient traverse. Cowper, 575; Sayre, etc., v. Minns, 2 Burr. 772; Cornwallis v. Savery, 3 Burr. 1725.[3]

SECTION 2.—PUIS DARREIN CONTINUANCE

PEMIGEWASSET BANK v. BRACKETT.

(Superior Court of Judicature of New Hampshire, 1829. 4 N. H. 557.)

Assumpsit upon a promissory note. The cause was tried here at November term, 1828, upon the general issue, when it was admitted, that the defendant made the note. It was then shown in evidence, on his part, that a suit was commenced by the plaintiffs against one James Batchelder, on the said note, the same having been made by said Batchelder as principal, and by the defendant and S. A. Pearson as sureties, and that judgment was rendered in the said suit in favour of the plaintiffs in the court of common pleas for this county, in February, 1827, for $180.51, being the amount then due upon the note; that an execution issued on said judgment, was delivered to a deputy sheriff in April, 1827, who, on the 28th September, in the same year, received of this defendant the amount of the debt in said execution, and returned the same, satisfied as to the debt, and not satisfied as to the costs, and afterwards paid over to the cashier of the bank the sum received as aforesaid. This suit was commenced on the 28th May, 1827.

Upon this evidence, a verdict was taken by consent for the plaintiffs, for the sum of $5.40, being the interest on the note from the time judgment was rendered against Batchelder, till the time when the money received by the deputy sheriff was paid to the cashier, subject to the opinion of the court upon the foregoing case.

RICHARDSON, C. J., delivered the opinion of the court.

[3] "* * * Whenever new matter is introduced, the pleading must conclude with an averment. * * * The reason is obvious, because the plaintiff might otherwise be precluded from setting forth matter which would maintain his action, though the matter pleaded by the defendant be true." Spencer, J., in Service v. Heermance, 1 Johns. (N. Y.) 91, 93 (1806).

"The rule is that, where the whole substance of the last pleading is denied, the conclusion must be to the country; otherwise the pleadings may be interminable, without coming to a formal issue." Wilde, J., in Sampson v. Henry, 11 Pick. (Mass.) 379, 386 (1831).

The question is whether, upon the pleadings in this case, the matter offered in evidence by the defendant is a legal answer to the action.

The manner in which a defendant is to avail himself of any matter of defense which he may have depends in some measure upon the time when such matter of defense arises; whether before or after the commencement of the suit; and there are different forms of pleading founded upon this circumstance. The law makes this distinction on account of the costs of the suit. It would be unjust that a plaintiff who had rightfully commenced a suit for a just cause be barred by matter arising after the commencement of the action, and subjected to pay all the costs from the beginning. To prevent this injustice, the law compels a defendant to plead matter arising after the commencement of the action in a particular manner, that the court may be enabled to settle the question of costs on just principles.

Where a defendant has a good defense to an action, at its commencement, he may, in general, avail himself of it upon the general issue, and when he cannot thus avail himself of it, he can plead it in bar, and, in either case, if he prevail in the suit, he is entitled to costs.

When any matter of defense arises after the commencement of the action, and before plea pleaded, it may be pleaded in bar of the further maintenance of the suit. If the plaintiff confesses the plea, the action stops, and the defendant is allowed no costs. If the plaintiff elects to proceed and ultimately fails in the suit, the defendant is entitled to his costs arising after the plea was put into the cause. 4 B. & C. 117, Lyttleton v. Cross.

We have decided that a general release given after the commencement of the action forms an exception to this rule, and may be pleaded in bar of the action generally. The reason of this is that, when a general release is given, the costs of the suit, up to the time of the release, are presumed to have been adjusted, and cannot be made the subject of any contest in the cause. There is, therefore, no reason why the release should not be pleaded as a general bar. Kimball v. Wilson, 3 N. H. 96, 14 Am. Dec. 342. But in such a case the release must be pleaded according to the fact as given after the commencement of the action, otherwise it cannot be admitted in evidence.

When any matter of defense arises after plea pleaded, it must be pleaded puis darrein continuance,[4] and such plea is a waiver of all the former pleadings.

[4] Brown v. Brown, 13 Ala. 208, 48 Am. Dec. 52 (1848); Costar v. Davies, 8 Ark. 213, 46 Am. Dec. 311 (1847); Canfield v. Eleventh School District, 19 Conn. 529 (1849); Straight v. Hanchett, 23 Ill. App. 584 (1887); Jackson v. Rich, 7 Johns. (N. Y.) 194 (1810); 17 Ency. Pl. & Pr. 266; 31 Cyc. 493. Accord.

For the distinction between the manner of pleading matters arising after the commencement of the action and before plea pleaded or issue joined and that of pleading matters arising after plea pleaded or issue joined, see Sadler v. Fisher's Adm'r, 3 Ala. 200 (1871); Kenyon v. Sutherland, 3 Gilman (8 Ill.) 99 (1849); Rowell v. Hayden, 40 Me. 582 (1855); Semmes v. Naylor, 12 Gill & J. (Md.) 358 (1842); Cutter v. Folsom, 17 N. H. 139, 149 (1845); Le Bret v. Papillon, 4 East, 502 (1804).

Such being the nature and objects of pleas in bar of the further maintenance of actions, we should suppose from the nature of the thing, that the matter of such pleas could not be given in evidence under the general issue as an answer to the action. The general issue, as well as pleas in bar, goes to the commencement of the action. 1 Tidd's Practice, 592; 1 Chitty's Pl. 472.

It seems to have been held, in Bird v. Randall, 3 Burr. 1345, that matter arising after the commencement of the action might be given in evidence on the general issue.[5] And in Sulivan v. Montague, Douglas, 110, it was said that actio non went to the time of plea pleaded. But it is now settled in England that matter of defense arising after the commencement of the action cannot be pleaded in bar generally, but must be pleaded in bar of the further maintenance of the suit. 1 Chitty's Pl. 655; 4 East, 507; 3 D. & E. 188; Law's Pl. in Assumpsit, 636, 666; 2 Esp. N. P. Cases, 504; 1 Chitty's Pl. 531, 532. In Storey v. Bloxam, 2 Esp. N. P. C. 504, Lord Kenyon said it was the practice to give payments made after the commencement of the action in evidence under the general issue. But there is no adjudged case in which it has ever been held that such a payment can be given in evidence, on the general issue, as an answer to the entire action.

In Massachusetts it has been decided that whatever in assumpsit shows a satisfaction to have been received by the plaintiff before trial may be given in evidence on the general issue. Baylies v. Fettyplace, 7 Mass. 325.

And in a writ of right a release obtained after the commencement of the action was held to be evidence upon the general issue. Poor v. Robinson, 10 Mass. 131.

But in Andrews v. Hooper, 13 Mass. 472, it was decided that, in a real action, a title obtained after the commencement of the action could not be used as a defense in any shape, and the court speak of the decision in the case of Sulivan v. Montague as not law. It is therefore probable that at this time no matter of defense arising after the commencement of the action can be given in evidence on the general issue in Massachusetts, as a defense to the whole action.

In New York matter of defense arising after the commencement of the suit must be pleaded; at least, their reports show nothing to the contrary. Palmer v. Hutchins, 1 Cow. (N. Y.) 42; The Bank v. Moore, 2 Johns. (N. Y.) 294; Palmer v. Mulligan, 2 Caines (N. Y.) 380; Broome v. Beardsley, 3 Caines (N. Y.) 172; Brower v. Jones, 3 Johns. (N. Y.) 229.

[5] The Illinois courts, relying on Bird v. Randall, 3 Burr. 1345, hold that in actions upon the case any defense otherwise admissible under the general issue is properly admitted, though it arose after action brought and was not pleaded specially either to the further maintenance of the suit or puis darrein continuance. Papke v. G. H. Hammond Co., 192 Ill. 631, 61 N. E. 910 (1901); Kapischki v. Koch, 180 Ill. 44, 54 N. E. 179 (1899); City of Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271 (1892).

When matter is pleaded puis darrein continuance, it is a waiver of all former pleadings. Why is this, if such matter is evidence upon the general issue? In Austin v. Hall, 13 Johns. (N. Y.) 286, 7 Am. Dec. 376, a release obtained after the commencement of the action was pleaded in bar of the action with the general issue. But no question appears to have been raised upon the form of pleading.

It seems to us that, from the nature of the case, matter arising after the action brought cannot be given in evidence upon the general issue, as an answer to the action, because it cannot be, in its nature, an answer to the action generally, but only to the further maintenance of the action.

If such matter of defense can be so used, it must, from the nature of the thing, be a good general bar, when specially pleaded; and the rules which have been established with respect to pleas in bar of the further maintenance of actions are idle and useless. Indeed, they are worse than useless with respect to the defendant, because they deprive him of his costs in cases where, by using the general issue, he would be entitled to them. If he use the matter as a defense upon the general issue, and prevail in the suit, he will be entitled to his costs from the beginning. If he plead it in bar of the further maintenance of the suit and prevail, he will be entitled at most to costs from the time of filing his plea.

It will be convenient in practice to hold defendants to plead such matter specially. It will give the plaintiff an opportunity to elect whether he will proceed in the action, and the question of costs may be settled by the record. We see no reason why partial payments might not be permitted to be given in evidence upon the general issue to reduce the damages,[6] but we are clearly of opinion that payment cannot be so given in evidence as an answer to the entire action, and that, in this case, there must be judgment on the verdict.

DAVIS v. BURGESS.

(Supreme Court of Rhode Island, 1892. 18 R. I. 85, 25 Atl. 848.)

MATTESON, C. J. The defendant pleaded, by way of plea puis darrein continuance, that on December 1, 1891, he in his capacity as administrator, before payment of any claim against the estate of his intestate, except funeral charges, and charges for medicine and attendance upon the intestate in his last sickness, found the estate of his intestate insolvent, and represented its circumstances and condition to the municipal court of Providence, exercising probate jurisdiction, and the same court which had granted to him letters of administration on the

[6] McMillian v. Wallace, 3 Stew. (Ala.) 185 (1830); Hudson v. Johnson, 1 Wash. (Va.) 10 (1791); Hutchinson v. Hendrickson, 29 N. J. Law, 180 (1861). Accord.

estate; and that thereupon said court adjudged the estate insolvent, and appointed commissioners to receive and examine the claims of creditors of the estate, and allowed six months to the creditors to bring in and prove their claims; and that no appeal was taken from the decree of the court, and that the time therefor expired on January 10, 1892. To this plea the plaintiffs replied precludi non, because said estate was not represented insolvent and commissioners appointed, as set forth in the plea, until after the expiration of more than two years from the time letters of administration were granted. The defendant demurred to the replication. The court, on hearing, overruled the demurrer, and sustained the replication, for the reason that Pub. St. R. I. c. 186, § 20, provides that "the pendency of any commission, as aforesaid, shall be no bar to any action against the executor or administrator, as aforesaid, after the expiration of two years from the time letters of administration were granted."

The plaintiffs thereupon moved for judgment on the ground that the plea puis darrein continuance, having been pleaded in bar, was a waiver of the pleas originally filed, and that the cause of action was admitted on the record to the same extent as if no other defense had been urged except that contained in the plea puis darrein continuance.

The defendant thereupon moved to withdraw his plea puis darrein continuance, that he might rely on the pleas originally filed. At a former hearing, before a single justice of the court, the motion was denied; the justice being of the opinion that the pleas originally filed were waived by the filing of the plea puis darrein continuance, and that the case should stand for assessment of damages.

Since then the defendant has obtained leave to reargue the question before the full court, and has reargued it with greater care and thoroughness than at the former hearing.

There is no doubt that the filing of a plea puis darrein continuance, where it extends to the plaintiff's entire cause of action, and not merely to a part of the plaintiff's claim as contained in a particular count in the declaration, or to the plaintiff's remedy, is a waiver of the pleas previously filed.[7] Kimball v. Huntingdon, 10 Wend. (N. Y.) 675, 679, 25 Am. Dec. 590; Yeaton v. Lynn, 5 Pet. 224, 231, 8 L. Ed. 105; Wallace v. McConnell, 13 Pet. 136, 152, 10 L. Ed. 95; Chitty, Pl. *636, *638. The rule is based on the hypothesis that the plaintiff, by his plea puis darrein continuance, abandons the original defenses set up, and substitutes in place of them the defense contained in that

[7] Angus v. Trust & Savings Bank, 170 Ill. 298, 48 N. E. 946 (1897); Scott v. Brokaw, 6 Blackf. (Ind.) 241 (1842); Morse v. Small, 73 Me. 565 (1882); Webb v. Steele, 13 N. H. 230 (1842); Doe v. Sanderson, 18 N. J. Law, 426 (1842); Greer v. Sheppard, 2 N. C. 96 (1799); Woods v. White, 97 Pa. 222 (1881); Lincoln v. Thrall, 26 Vt. 304 (1854); Adler v. Wise, 4 Wis. 159 (1855); Barber v. Palmer, 1 Ld. Raym. 693 (1701). Accord. Wright v. Evans, 53 Ala. 103 (1875: by statute); Parkhill's Adm'rs v. Union Bank of Florida, 1 Fla. 128 (1846: by statutory construction); Heyfron v. Mississippi Union Bank, 7 Smedes & M. (15 Miss.) 434 (1846: probably by statutory construction). Contra.

plea. Hence it does not apply to its full extent when the defense set up in the plea puis darrein continuance is only partial, but applies only so far as the defense so pleaded is intended as a defense. Morris v. Cook, 19 Wend. (N. Y.) 699.[8] So, too, when the defense thus pleaded merely affects the remedy. Rayner v. Dyett, 2 Wend. (N. Y.) 300; Lincoln v. Thrall, 26 Vt. 304. In such cases as the defense set up covers not at all, or only in part, the merits of the plaintiff's claim, there is no room for the hypothesis that the defendant intends to waive his defenses set up in the original pleas, and to substitute for them the partial defense, or defense affecting the remedy only; and therefore effect is given to the plea puis darrein continuance as a waiver only so far as the defense it contains may be presumed to have been intended as a defense to the merits.

In the present case the matter set up in the plea did not go to the merits of the plaintiffs' claim at all. Its purpose was simply to bring to the attention of the court the pendency of the commission in insolvency, that the judgment, if any, which the plaintiffs should obtain, in case of their election to proceed with the suit instead of proving their claim before the commissioners, might be limited to the surplus of the estate remaining in the defendant's hands, for the payment of the debts of the intestate, on the settlement by the defendant of his account with the court of probate, after deducting therefrom the amount of the claims allowed by the commissioners. The plea failed because more than two years had elapsed from the granting of letters of administration, and after that period the pendency of the commission did not affect the plaintiffs' right to proceed with their suit. The plea, however, went merely to the plaintiffs' remedy, and did not apply to the merits of their claim. For that reason we are of the opinion that it did not operate as a waiver of the pleas originally filed, or preclude the defendant from urging the defenses set up in them.

The cause will stand for trial before a jury on the issues presented by the pleadings; leave being given to the defendant to withdraw the plea puis darrein continuance.

SECTION 3.—PLACE

MEHRHOF BROTHERS' BRICK MANUFACTURING CO. v. DELAWARE, LACKAWANNA & W. R. CO. et al.

(Supreme Court of New Jersey, 1888. 51 N. J. Law, 56, 16 Atl. 12.)

GARRISON, J.[9] The plaintiffs, who operate a brickyard at the township of Lodi, in the county of Bergen, on the bank of the Hackensack

[8] Sanderlin v. Dandridge, 3 Humph. (Tenn.) 99 (1842). Contra.

[9] Portions of the opinion are omitted.

river, bring this action against the defendants for unlawfully obstructing the said river, whereby the boats of the plaintiffs, provided for transporting their bricks to market, were prevented for a long period of time from passing down said river, during which time the plaintiffs bore the expense of their keep, together with the loss of the sale of a large quantity of their bricks.

To this declaration a general demurrer is interposed.

The causes for demurrer are reducible to three: First, * * *; second, that there is no sufficient allegation or description of the locality of said obstruction; third, * * *.

The second ground of demurrer questions the sufficiency of the description of the location of the obstruction. The contention of the defendants is that this is a local action requiring a particular description of the gravamen.

In passing upon this objection, it must be borne in mind that the action in the present case is not for damages for an injury done to realty, or arising from an injury to any real right of plaintiffs. It was not plaintiffs' brickyard that was injured; it was their right to dispose of their bricks. If such a cause of action be called "local," it is by force of precedent, and not upon the essential principles upon which the division of actions into local and transitory is based.

Mr. Stephens, in his brief sketch of trial by jury traces the history of the practice of "laying the venue truly" from the period when the jury were summoned as witnesses down to the time of the change whereby they became judges of fact from the testimony of others. He shows that in the former case it was of essential importance that the jury should have personal knowledge of the facts, and hence that the venue should be laid truly at the place where the facts arose; whereas, after the latter change, this became a matter of no practical importance.

"A difference," says this learned writer (Steph. Pl. 288), "began now to be recognized between local and transitory matters. The former consisted of such facts as carried with them the idea of some certain place comprising all matters relating to realty, and hardly any others." The rule, as it soon became, is stated by Mr. Chitty as follows (1 Chit. Pl. 268): "When the cause of action could only have arisen in a particular place or county, it is local, and the venue must be so laid." This author speaking of the extension of the local action to certain actions for damages, merely confines it in terms to actions affecting interests in real property.

The distinction thus early made was easy of application where the line could be sharply drawn; and in mixed cases, where the damage to a personal right was inflicted by interference with a right in real property, as an easement, the courts leaned to the side of holding it a local action. This was in principle a departure from the original distinction, for all of the essential reasons for the division were no longer applicable, since the cause and result of such injuries might

be in different places or counties; and the judgment, to have effect, did not have to be in the same county with the injury, as in ejectment, real actions, or proceedings in rem.

Thus there arose a subdivision of local actions in which the distinction was formal merely. This led Lord Mansfield, in Mostyn v. Fabrigas, Cowp. 176, to say: "There is a formal and a substantial distinction as to the locality of trials. I state them as different things. The substantial distinction is where * * * the effect of the judgment cannot be had if it is laid in the wrong place."

Later, Lord Ellenborough, in Company of Mersey v. Douglas, 2 East, 497, which was an action for diverting the water of a navigable stream, said: "This action is in its nature confessedly local, but the question is whether the gravamen need be described with any local certainty, and I incline to think it need not, but that it is sufficient if it be laid at any place within the body of the county, * * * for otherwise, how is a venue to be laid to the fact of the obstruction, when that takes place in the higher part of the stream flowing in one county, and the injury is sustained in the lower part of the same stream in a different county, in which the action is brought? It is sufficient to describe the substance of the injury in order to give the other party notice of what he is to defend, and it is sufficient in the form of pleading to allege the gravamen at any place within the body of the county. Therefore the manner in which it is here stated ought rather to be referred to venue than to local description."

The distinction thus indicated has been preserved, with the effect of placing outside the class of local actions requiring a particular description of the location of the injury all those actions for damages for injuries which could have happened in some other place, or where recovery of real property is not sought.

In the case of Livingston v. Jefferson, 1 Brock. 203, which was trespass quare clausum fregit against a former president of the United States, brought in the circuit court for the district of Virginia, for damages for removing the plaintiff from the batture in New Orleans, Chief Justice Marshall held that, where the action was for damages, and not to recover real property, etc., the distinction between local and transitory actions, while still to be observed, was merely technical. This was also the opinion of Chancellor Walworth, sitting in the court of errors, in the case of Watts v. Kinney, 6 Hill (N. Y.) 82. And in Gibbons v. Ogden, 6 N. J. Law, 285, it was held, in an action for restraining the plaintiff (by an injunction of a foreign state) from navigating a certain highway between specified points, that the location of the tort need not be described.

We may conclude, then, that a description of the location in the present action is not a substantial averment, and, if made at all, is to be referred to matter of venue only.

The practice of laying the venue in the body of the declaration has, for reasons already given, become a mere matter of form, or, in the lan-

guage of Mr. Stephens, "an unmeaning form; the venue in the margin having been long found sufficient for all practical purposes." Steph. Pl. 282.

This practice was in the English courts, abolished by the making of the rule of Hilary Term, 4 Wm., which provides that "in future the name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff, and no venue shall be stated in the body of the declaration, or in any subsequent pleading."

I state this rule as showing how entirely formal the practice of laying a venue in the body of a pleading had become in the eyes of those who shape the practice of the English courts.

Since, therefore, an affirmative statement of the location of the obstruction is not necessary by way of description, and, if inserted by way of venue in the body of the pleading, would go to a matter of form only, its omission is no ground for general demurrer, being within the operation of section 139 of the practice act, which provides that no pleading shall be deemed insufficient for any defect which could theretofore be objected to only by special demurrer. That the objection to the failure to state the venue in the body of the declaration is within the operation of this statute was decided in the cases of Reed v. Wilson, 41 N. J. Law, 29, and Gibbons v. Ogden, 6 N. J. Law, 285. * * *[10]

SECTION 4.—TIME

GORDON v. JOURNAL PUBLISHING CO.

(Supreme Court of Vermont, 1908. 81 Vt. 237, 69 Atl. 742.)

Action for libel by Robert T. Gordon, by his next friend, against the Journal Publishing Company. Judgment for defendant on demurrer, and plaintiff excepts. Affirmed and remanded.

[10] "Nor is the want of a venue in the first count in the writ any objection to a recovery. The plaintiff could recover if that count was struck out of the writ. Besides, a venue in a transitory action is entirely useless. Venues in transitory actions were long ago abolished in England, and were declared unnecessary in Massachusetts more than half a century ago (24 Pick. 398, rule 45); and we think they should be allowed to become obsolete in this state. Of course these remarks are not applicable to local actions. In local actions a proper venue is still necessary." Walton, J., in Blackstone National Bank v. Lane, 80 Me. 165, 169, 13 Atl. 683 (1888).

In transitory actions the venue need not be proved as laid. Owen v. McKean, 14 Ill. 459 (1853); Smith v. Bull, 17 Wend. (N. Y.) 323 (1837); Platz v. McKean Township, 178 Pa. 601, 36 Atl. 136 (1888); Mostyn v. Fabrigas, 1 Cowp. 161 (1774).

In local actions where the wrong venue is laid, the defect is one of substance. White v. Sanborn, 6 N. H. 220 (1833); Mayor v. Ewart, 2 W. Bl. 1068 (1776). See Crook v. Pitcher, 61 Md. 510 (1884).

TYLER, J.[11] Case for an alleged libel. The defendant demurs to the declaration, and assigns several causes of demurrer. * * *

It is laid down in the text-books that the allegation of the time of committing injuries ex delicto is seldom material (1 Chit. Pl. 384); that the precise day on which a material fact alleged in the pleadings took place is in most cases immaterial, except when the date of a record, or other writing, or some other fact, the time of which must be proved by a written document, is alleged. But these statements are not intended to relax the rule given in all works on pleading, that in personal actions the pleadings must allege the time; that is, the day, month, and year when each traversable fact occurred. Stephen on Pl. 291. Gould says, on page 79, that the time of every traversable fact must be stated, that every such fact must be alleged to have taken place on some particular day. The requirement of certainty is not relaxed by the rule that a variance between the time alleged and the proof is not fatal.[12] It is evident that the words "or about" take all certainty from the allegation and virtually leave the first count without any time stated. It was held in Cole v. Babcock, 78 Me. 41, 2 Atl. 545, that the word "about" rendered the allegation of the time indefinite and uncertain. See Platt v. Jones, 59 Me. 232, and State v. Baker, 34 Me. 52. The first count must, therefore, be held insufficient. * * *

Judgment affirmed and cause remanded.[13]

[11] Only so much of the opinion is printed as deals with the plaintiff's failure to allege with certainty the time of the alleged publication.

[12] That such a variance is not fatal, where the time alleged is not material or matter of description, see Crawford v. Camfield, 6 Ala. 153 (1844); Sage v. Hawley, 16 Conn. 106, 41 Am. Dec. 128 (1844); Searing v. Butler, 69 Ill. 575 (1873); Burbank v. Horn, 39 Me. 233 (1855); Howland v. Davis, 40 Mich. 545 (1879); State v. Martin, 8 Mo. 102 (1843); Drown v. Smith, 3 N. H. 299 (1825); Allen v. Smith, 12 N. J. Law, 159, 168 (1831); Dox v. Dey, 3 Wend. (N. Y.) 356 (1829); Stout v. Rassel, 2 Yeates (Pa.) 332 (1798); Kidder v. Bacon, 74 Vt. 263, 271, 52 Atl. 322 (1902); Purcell v. Macnamara, 9 East, 157 (1807). The earlier rule was that such variance was not permitted unless the immaterial date was alleged under a videlicet. 2 Wms. Saunders, 291d, note (h).

[13] In addition to the authorities cited in the opinion, see Opdycke v. Easton, etc., Co., 68 N. J. Law, 12, 52 Atl. 243 (1902); Timmerman v. Morrison, 14 Johns. (N. Y.) 369 (1817); Denison v. Richardson, 14 East, 291 (1811); 1 Chitty, Pl. (16 Am. Ed.) 272. Accord. The date must be alleged as before the commencement of the action. Roud v. Griffith, 11 Serg. & R. (Pa.) 130 (1824).

SECTION 5.—DESCRIPTION

HAYNES v. CRUTCHFIELD.

(Supreme Court of Alabama, 1844. 7 Ala. 189.)

This was action of detinue by the defendant in error against the plaintiff. The declaration contains two counts, each of which charge the detention of a female slave named Betty, and others who are particularly named; also many articles of household furniture, plantation tools, stock, etc., which are described generally, by their respective numbers. To each of these counts the defendant demurred, but his demurrer being overruled, he pleaded the general issue, and the cause was thereupon submitted to a jury. On the trial, the defendant excepted to the ruling of the Circuit Judge. * * *

COLLIER, C. J.[14] 1. It is not necessary where the action of detinue is brought for the recovery of several articles that the value of each should be stated separately in the declaration; but generally the jury should sever the value of each by their verdict, that the plaintiff may recover them or their value, severally, in satisfaction; and the defectiveness of the finding in this respect, it is said cannot be supplied by a writ of inquiry. 1 Chitty's Plead. 123, 124; 2 Steph. N. P. 1313; Pawly v. Holly, 2 W. Black. Rep. 853; 2 Stark. Ev. 494, 495, notes 1, 2.

The declaration states the names of the slaves, the number of beds, bedsteads, etc., sought to be recovered, without a description of size, quality, etc., and this we think is quite sufficient upon demurrer. Detinue lies for writings whether in a box or not, and it is not necessary to state the date of a deed in a declaration. 2 Bacon's Ab. 317; 2 Steph. N. P. *1313. So it may be maintained for money in a chest or bag; for particular pieces of gold or silver; for so many ounces of gold or silver; or for an infant negro naming the mother without any other description. 3 Com. Dig. 364; Bass v. Bass, 4 Hen. & M. (Va.) 478; Holladay v. Littlepage, 2 Munf. (Va.) 539.

In Boggs v. Newton, 2 Bibb (Ky.) 221, it was held, that a declaration in detinue for a horse, without designating the animal either by name, color, size, figure, etc., is bad; and that in trespass and trover where damages only are recovered, the same strictness in pleading is not required. See 1 Chitty's Plead. 123; Buller's N. P. 49, 50; 2 Saunder's Rep. 74, n. 2.

Whether the case cited from 2d Bibb can be supported we need not inquire; perhaps it may, as "horse" is a generic term, and it is easy to specify the sex, etc. But we think it sufficient to declare for a negro

[14] Only so much of the statement of facts and of the opinion is printed as deals with the ruling of the Circuit Judge on defendant's demurrer.

woman by name, without stating her complexion, size, age, etc.; or for a cow without describing her color, mark, brand, etc.; or for so many knives and forks, without mentioning the maker's name, the character of the handles, metal, etc. In all these cases, it would be difficult by any circumlocution, so to particularize the property sued for, as to enable a person to identify and distinguish it by inspection. There are many negroes, as well as cows, knives and forks, etc., which would answer any reasonable or ordinary description that could be given on paper. This being the case, the declaration is sufficiently certain as applied to the subject-matter, and to require more would, in many instances, be a denial of the remedy by action of detinue, where it is confessedly proper; for how can the loser or bailor of a great number of articles describe them with exactness and particularity? This result should be the more studiously avoided, as the statute has made the action of detinue a more efficacious, safe, and in some instances, more expeditious remedy than trover. See Hilldreth v. Becker & Harvey, 2 Johns. Cas. (N. Y.) 339; Coffin v. Coffin, 2 Mass. 363. * * *[15]

DEMING et al. v. GRAND TRUNK R. CO.

(Supreme Judicial Court of New Hampshire, 1869. 48 N. H. 455, 2 Am. Rep. 267.)

Assumpsit. Writ dated May 26, 1866.

The first count alleged that defendants were common carriers by railway from Northumberland, N. H., to Portland, Me.; that on February 22, 1866, plaintiffs at the request of defendants delivered to defendants at Northumberland depot "certain goods and chattels, to wit, a large quantity of wool of the plaintiffs, to wit, seven thousand eight hundred and thirty-seven pounds of wool, of great value, to wit, five thousand dollars, to be safely carried and conveyed by the defendants, by and on said railway, from the depot aforesaid at Northumberland aforesaid to Portland aforesaid, immediately and without delay, after said wool was so delivered by said plaintiffs to said defendants at said depot, to wit, by the next freight train of cars which should go over and upon said railway from said depot to said Portland after said delivery of said wool to said defendants as aforesaid, and then, to wit, at said Portland, to be safely delivered by said defendants for said plaintiffs, to be thence transported and conveyed for said plaintiffs, by another party to Boston in the commonwealth of Massachusetts." * * *

BELLOWS, J.[16] In this case it is objected that there is a variance

[15] Cf. Bottomley v. Harrison, 2 Str. 809 (1729: trover); Shum v. Farrington, 1 Bos. & P. 640 (1797: debt on bond). For a full discussion of the rule requiring greater certainty of description in detinue and replevin than in trover, see Taylor v. Wells, 2 Wm's Saunders, 74, note 1 (1671).

[16] Only so much of the statement of facts and opinion as deals with the question of variance is printed.

between the amount of wool delivered to the defendants, as alleged in the declaration, and the amount proved; the allegation being that a large quantity of wool of the plaintiffs, to wit, 7837 pounds, was so delivered, and the proof being of a smaller quantity. The inquiry is, then, whether the plaintiff was bound to prove the precise amount laid in his declaration; and this must turn upon the question whether the amount so stated is material and traversable or not. If it is, the consequences of a variance will not be avoided by the fact that the allegation is under a videlicet. On the other hand, if the matter is not material, the party is not concluded by the allegation in this form. 1 Ch. Pl. 10th Am. Ed. 317, 318, and cases; 2 Saund. 291 c, note, where it is said by Sergeant Williams that, if a party does not mean to be concluded by a precise sum or day stated, he ought to plead it under a videlicet, for, if he do not, he would be bound to prove the exact sum or day laid.

In the present case the action is brought to recover damages for not transporting in due time a large lot of wool, to wit, 7837 pounds, of great value, to wit, $5000; and it is obvious from the form of the allegation that the pleader did not intend to bind himself to the precise amount of wool, or its value, as stated under the videlicet.

Had the declaration stated the contract to be that defendant would transport that precise amount of wool, proof of a different amount might have been a variance, as being a different contract in fact; but no such thing is stated here. The material allegations are that plaintiff delivered to defendant a large quantity of wool which the defendant agreed to transport, etc.; and what is said about the weight and value is much as if stated as matter of estimate, and not as a material part of the contract. Besides the variance suggested is not that the contract was to transport another and different quantity of wool, but that the quantity delivered was less than the quantity stated.

It is very clear, we think, that the precise quantity delivered was not a material allegation; and no issue could be taken upon it, any more than upon the allegation as to value. The declaration is in the ordinary form in suits against common carriers; and we find nothing that gives any countenance to the idea that the plaintiff must prove the weight and value of the goods, precisely as alleged, although stated under a videlicet. Such a doctrine would be attended with great inconvenience, amounting in many cases to almost a denial of justice.

In Hamer v. Raymond et al., 5 Taunt. 789, it was held, in an action on the case for running foul of posts in the river supporting the plaintiff's wharf, that it was not necessary to prove the posts or wharf to be at the place at which they were, under a videlicet, alleged to be situate.[17] * * *

Judgment on the verdict.

[17] For a discussion as to the office and effect of the videlicet, see Chitty, Pleading (16th Am. Ed.) *325 et seq.; Will's Gould, Pleading, 221 et seq.

SECTION 6.—BILLS OF PARTICULARS

BOGARD v. ILLINOIS CENTRAL RY. CO.

(Court of Appeals of Kentucky, 1903. 116 Ky. 429, 76 S. W. 170, 3 Ann. Cas. 160.)

BURNAM, C. J. On the 7th of October, 1902, the appellant, Abe Bogard, brought suit against the Illinois Central Railroad Company in the McCracken circuit court to recover damages alleged to have been suffered by him by reason of certain alleged acts of negligence of appellee in the operation of one of its engines and train of cars in McCracken county. The petition is as follows: "The plaintiff, Abe Bogard, says that he is a citizen and resident of the state of Kentucky and county of McCracken, and that the defendant is a corporation authorized by the laws of Kentucky to operate a railroad, and is now, and was at all times hereinafter named, operating and running a railroad in and through the county of McCracken and state of Kentucky, and said defendant is empowered by law to sue and be sued, contract and be contracted with; and heretofore, and within the last twelve months, while engaged in operating and running an engine along its said road in the said county of McCracken, the defendant, without fault or negligence on the part of the plaintiff, carelessly, recklessly, and wrongfully, and by willful, reckless, and wrongful act, ran its engine and train upon and against plaintiff, and knocked him down, and greatly bruised and injured his legs, thighs, hips, back, spine, arms, chest, neck, and head, and made plaintiff sick and sore for many days, and plaintiff's said injuries are permanent, and he will never recover from some of same; thereby negligently inflicting upon him and causing him to suffer great bodily pain and mental agony, and causing him to lose much valuable time, and to incur doctor's bill to the amount of $25; and by said collision, caused by the negligence and wrongful act of defendant running its engine aforesaid upon plaintiff, he has been damaged in the sum of two thousand dollars ($2,000). Wherefore he prays judgment against the Illinois Central Railroad Company for $2,000, his costs herein expended, and for all proper relief." The railroad company, at the appearance term of the action, moved the court in writing to require the plaintiff, in addition to the facts alleged in his petition, to state the date of the injury complained of, the point where it occurred, the number of the train producing it, and the parties in charge thereof. Over the objections of plaintiff, the motion was sustained, and, declining to plead further, his petition was dismissed without prejudice, and he has appealed to this court.

The only question which arises upon the present appeal which is reviewable in this court is whether or not the court below had the

power to grant the application of the defendant, and, if so, whether the facts in the case justified their exercise herein. If it has exceeded its authority, we have jurisdiction, and it is our duty to correct the error of law. There is no uncertainty or indefiniteness with respect to the nature of the charge made against the defendant. The difficulty under which the defendant claims to labor is that the plaintiff has not sufficiently specified the facts as to the time and place where the alleged acts of negligence occurred to enable it to intelligently defend the action. The defendant operates a trunk line through McCracken county, and it has perhaps 50 miles of track within the county. In course of 12 months thousands of trains pass over its road, operated by hundreds of different employés, at all hours of the day and night. The plaintiff necessarily has information as to the time and place of the accident, whether it was day or night, whether the injury was inflicted by a freight or passenger train; and a state of case might exist when it would be impossible for the defendant to secure this information, so necessary for the proper conduct of its defense. When such a case arises, the trial court has inherent power to require such information to be furnished. This question was very fully considered in the case of Commonwealth v. Snelling, 15 Pick. (Mass.) 321. The opinion in that case was delivered by Chief Justice Shaw. It was held that where a person is indicted for a libel containing general charges of official misconduct against a magistrate, the court was authorized to require him previously to the trial, in case he intended to give the truth of the publication in evidence, to file a bill of particulars specifying the instances of misconduct which he proposes to prove. After a thorough review of all the authorities, he says: "The general rule to be extracted from these analogous cases is that where, in the course of a suit, from any cause, a party is placed in such a situation that justice cannot be done in the trial without the aid of the information to be obtained by means of a specification or bill of particulars, the court, in virtue of the general authority to regulate the conduct of trials, has power to direct such information to be seasonably furnished, and in authentic form." In Tilton v. Beecher, 59 N. Y. 176, 17 Am. Rep. 337, in an action of "crim. con.," the application of the defendant for a bill of particulars was refused by the trial court on the ground of want of power to grant the bill. Upon appeal to the Appellate Court of New York it was held that the court below had the power to grant a bill of particulars. The opinion in that case was written by Judge Rapello, and, after a most exhaustive review of the authorities, English and American, bearing upon the question, said: "In action upon money demands consisting of various items, a bill of particulars of the dates and description of the transactions out of which the indebtedness is claimed to have arisen is granted almost as a matter of course; and this proceeding is so common and familiar that, when a bill of particulars is spoken of, it is ordinarily understood as referring

to particulars of that character. But it is an error to suppose that bills of particulars are confined to actions for the recovery of money demands arising upon contract. A bill of particulars is appropriate in all descriptions of actions where the circumstances are such that justice demands that a party should be apprised of the matters for which he is to be put for trial with greater particularity than is required by the rules of pleading.[18] They have been ordered in actions of libel, escape, trespass, trover, and ejectment, and even in criminal cases, on an indictment for being a common barrator, on an indictment for nuisance," etc., and concludes as follows: "A reference to a few of the authorities upon which these decisions were founded will show that in almost every kind of case in which the defendant can satisfy the court that it is necessary to a fair trial that he should be apprised beforehand of the particulars of the charge which he is expected to meet the court has authority to compel the adverse party to specify those particulars so far as in his power." A full discussion of the law applicable to motions of this character is found in 3 En. of P. & Pr. 517. The author says: "There is no inflexible rule as to the class of cases in which a bill of particulars will be granted, but it rests within the sound judicial discretion of the court, to be exercised only in furtherance of justice." "But the rule is quite well established that a party will not be obliged to furnish facts already known to his adversary, nor when the means of ascertaining the facts are equally accessible to both parties." We are of the opinion that, upon a proper showing that defendant did not have the information, or the means of readily ascertaining the time when and place where the accident occurred, and whether it occurred during the day or night, or was inflicted by a freight or passenger train, that the plaintiff should be required to furnish such information, if in his power. But it is not necessary or proper in an action for personal injuries that the petition should set out specifically the injuries complained of, or the details of the alleged acts of negligence of the defendant in inflicting the injury. In our opinion, the trial court erred in sustaining the motion to require the plaintiff to give the number of the train producing the injury, or the names of the parties in charge thereof. It is not at all probable that such information is in his possession, and, if the identity of the train inflicting the injury is established, the means of ascertaining these facts are more accessible to the defendant than to the plaintiff. Nor should the motion have been sustained at all without some showing by the defendant by affidavit or otherwise that it did not have the required information, or reasonable means of obtaining it.

The judgment of dismissal is therefore reversed, and cause remanded for proceedings not inconsistent with this opinion.

[18] For numerous cases accord, see 3 Encyc. Pl. & Pr. 523, 524; 31 Cyc. 568, 569.

ASELTINE v. PERRY.

(Supreme Court of Vermont, 1903. 75 Vt. 208, 54 Atl. 190.)

Assumpsit by A. M. Aseltine against William Perry. From a judgment for defendant on a referee's report, the plaintiff brings exceptions. Affirmed.

HASELTON, J. The plaintiff was a life insurance agent. The defendant, through the plaintiff's agency, made application for insurance on his life; and the plaintiff's principal, in accordance with said application, issued to the defendant a policy of life insurance, and delivered the same to the plaintiff for the defendant. At the time of said application the defendant executed and delivered to the plaintiff two notes, the consideration for which was an agreement that the agent should pay the company, for the insured, the amount of the first premium, which was $26.20. This the plaintiff did, and held the insurance policy and the notes. In these circumstances, the contract of insurance between the company and the defendant was a complete one, and the notes were valid. Porter v. Life Insurance Co., 70 Vt. 504, 41 Atl. 970.

After the maturity of the first note, but before the maturity of the second, the agent brought suit against the defendant in assumpsit, declaring on the common counts only. By his specification he sought to recover the premium as such. He introduced the notes in evidence, but only for the purpose of sustaining his specification. On the trial, which was had before a referee, the plaintiff disclaimed any right to recover upon the above-mentioned notes, but claimed to recover in accordance with his specification only.

The plaintiff's claim and specification being what they were, the court properly rendered judgment for the defendant on the referee's report. The case is one in which the plaintiff voluntarily limited his right of recovery by his specification and the position taken by him on trial. Johnson v. Cate, 75 Vt. 100, 53 Atl. 329. While a specification is no part of the declaration, in respect to subsequent pleadings,[19] it nevertheless circumscribes the scope of the evidence and the plaintiff's right of recovery.[20] Bank v. Lyman, 20 Vt. 666, Fed. Cas. No. 924;

[19] Royal Phosphate Co. v. Van Ness, 53 Fla. 135, 43 South. 916 (1907); Cicotte v. Wayne County, 44 Mich. 173, 6 N. W. 236 (1880); Voorhees v. Barr, 59 N. J. Law, 123, 35 Atl. 651 (1896); Dibble v. Kempshall, 2 Hill. (N. Y.) 124 (1841); Lapham v. Briggs, 27 Vt. 26 (1854); Chesapeake, etc., Co. v. Stock & Sons, 104 Va. 97, 106, 51 S. E. 161 (1905), semble; Abell v. Penn., etc., Ins. Co., 18 W. Va. 400 (1881); Riley v. Jarvis, 43 W. Va. 43, 26 S. E. 366 (1896); Kempster v. Purnell, 3 M. & G. 375 (1841). Accord. But see Attrill v. Patterson, 58 Md. 226, 238 (1882); Benedict v. Swain, 43 N. H. 33, 34 (1861); Fleurot v. Durand, 14 Johns. (N. Y.) 329 (1817).

[20] Vila v. Weston, 33 Conn. 42 (1865), semble; Columbia County v. Branch, 31 Fla. 62, 12 South. 650 (1893), semble; Morton v. McClure, 22 Ill. 257 (1859); Commonwealth v. Snelling, 15 Pick. (Mass.) 321 (1834); 3 Encyc. Pl. & Pr. 520; 31 Cyc. 570, note 79. Accord. See, also, note to Brewster v. Sackett, 1 Cow. (N. Y.) 571 (1823).

Lapham v. Briggs, 27 Vt. 27. It may be amended as the case develops, and, though not amended in terms, it may be treated as having been amended, if the course of the trial has been such as to permit it to be so treated. Greenwood v. Smith, 45 Vt. 37; Bates v. Quinn, 56 Vt. 49. Here the specification was not expressly amended, and the claim of the plaintiff and the course of the trial were such that it cannot be treated as having been amended by implication.

It is obvious from the record that the plaintiff would have had judgment below for the amount of the matured note, but for the erroneous position which he took on trial. His error cannot be attributed to the court.

Judgment affirmed.

SECTION 7.—DUPLICITY

PEOPLE'S NATIONAL BANK v. NICKERSON.

(Supreme Judicial Court of Maine, 1910. 106 Me. 502, 76 Atl. 937.)

KING, J. The sole question presented in this case is whether a declaration in a writ of entry containing in one count several distinct tracts of land is bad for duplicity.

"Duplicity in a declaration consists in joining in one and the same count different grounds of action, of different natures, or of the same nature, to enforce only a single right of recovery." Gould on Pleading (5th Ed.) p. 205, § 99.

In Chitty on Pleading (16th Ed.) vol. 1, star p. 249, it is said: "The plaintiff cannot by the common-law rule, in order to sustain a single demand, rely upon two or more distinct grounds or matters, each of which, independently of the other, amounts to a good cause of action in respect to such demand."

Mr. Stephen in his work on Pleading says (page 242) "that the declaration must not, in support of a single demand, allege several matters, by any one of which that demand is sufficiently supported." [21]

The distinction between the combining in one count of several distinct causes of action and duplicity must be kept clearly in mind. That distinction was aptly stated in Higson v. Thompson, 8 U. C. B. 561, 562, where the court said: "Duplicity in a count consists in supporting

[21] For applications of this rule, see Nave v. Berry, 22 Ala. 382 (1853: single breaches of separate promises in same contract); Jarman v. Windsor, 2 Har. (Del.) 162 (1837: same); Ferguson v. National Shoemakers, 108 Me. 189, 79 Atl. 469 (1911: several specifications of negligence); Laporte v. Cook, 20 R. I. 261, 38 Atl. 700 (1897: same).

the same claim on several distinct grounds not in laying several injuries in one count."

A declaration, therefore, is not bad for duplicity because more than one cause of action is set forth in one count, provided not more than one independent and sufficient ground or matter is therein alleged in support of a single demand or right of recovery.[22]

In Platt v. Jones, 59 Me. 242, it is said: "It is not quite accurate to say that two causes of action in one count render it double. Several items of account may be very properly embraced in one count, and yet each one of those items might be a good cause of action. So in the case of several trespasses upon the same lot of land."

It will be seen, upon examination of the declaration before us, that it does not violate the rule against duplicity. The pleader has set forth as his demand, or right of recovery, the right to the possession of four distinct tracts of land; the ground or matter alleged in support of his demand, or right of recovery, is that the defendant has disseised him of those tracts. If the declaration is to be construed as setting forth in one count a separate demand for each of those tracts, rather than a demand for them all combined, there is no duplicity, because there is no allegation of more than one ground relied upon in support of each single demand. In other words, if there is but one demand, or right of recovery, set forth—that is, the demand of the combined tracts—then there is but one ground relied upon in support of that demand, the defendant's disseisin; on the other hand, if there is set forth a distinct demand, or right of recovery, for each tract, still there is but one ground relied upon in support of any of those distinct demands, the defendant's disseisin. In neither case would the declaration be bad for duplicity.

In addition to the uniform authorities in support of the meaning and application of the doctrine of duplicity as defined by the learned authors above quoted, the following cases are directly in point as to the particular question now before us: Hotchkiss v. Butler, 18 Conn. 287; Den v. Snowhill, 13 N. J. Law, 23, 22 Am. Dec. 496. In the latter case the declaration, like the one at bar, contained but one count for several tracts of land. In answer to the position there taken, that the declaration was bad for double pleading, the court said: "No decision or authority was cited to show the legal soundness of this position, nor can I yield to the reasoning, however ingenious, of the defendant's counsel. On the contrary, all argument, all convenience, all analogy, and some decisions appear to me to hold the converse of this doctrine, and to show that in one action the plaintiff may recover several distinct tracts, and claimed under different titles, if from all he

[22] Setting forth more than one cause of action in one count is a fault in pleading, and is frequently termed duplicity. See, for example, Noetling v. Wright, 72 Ill. 390 (1874); Patterson v. Wilkinson, 55 Me. 42, 92 Am. Dec. 568 (1867) (semble); White Automobile Co. v. Dorsey, 119 Md. 251, 86 Atl. 617 (1912); Handy v. Chatfield, 23 Wend. (N. Y.) 35 (1840).

has been unlawfully ejected by the same defendant. * * * Three several slanderous charges, entirely unlike, circulated in as many different weeks, may be redressed in one suit. So may three several batteries, perpetrated as many months asunder. Under a single count for money had and received, the plaintiff may prove the receipt of money to his use by the defendant from divers persons, at divers times, and on occasions wholly disconnected. A bond, a note, a book account, a demand for rent or work done, may be included in one declaration. Is there any less incongruity in these combinations than for a plaintiff to seek by one action to be restored to three several tracts of land lying in the same township, from which he complains that the defendant has on the same day dispossessed him?"

It is the opinion of the court that the declaration in the case at bar is not open to the charge of duplicity.

Exceptions overruled.[23]

RAYMOND et al. v. STURGES.

(Supreme Court of Errors of Connecticut, 1854. 23 Conn. 134.)

In addition to the allegations mentioned in the opinion below, the declaration alleged in substance that defendants had brought suit against plaintiff to foreclose his equity of redemption in a certain tract of land, had brought an action of ejectment to eject him therefrom, and had recovered judgment for costs in the ejectment proceeding; that before decree in the foreclosure suit plaintiff and defendants agreed that the time for redemption should be limited therein to the first Monday in January, 1851; that defendants procured a decree limiting the time for redemption to the first day in January, 1851, and fraudulently induced plaintiff to believe that the decree limited the time to redeem to the first Monday in January, 1851; that relying thereon plaintiff omitted to redeem within the time limited and offered to redeem on the first Monday in January, 1915; but that defendants refused to permit redemption on that date.[24]

[23] "If at common law, in framing a declaration in assumpsit, the early practice was to make each demand the subject of a separate count, such demands were later embraced in one count, and were treated as comprising the consideration of but a single promise. Rooke v. Rooke, Cro. Jac. 245 (1611); Webber v. Tivill, 2 Saund. 121, b (1681). A recognition of this rule appears in Whitwell v. Brigham, 19 Pick. (Mass.) 117 (1837), where a declaration containing all the money counts in one count was held to be undoubtedly good." Braley, J., in Noble v. Segal, 214 Mass. 159, 160, 100 N. E. 1112 (1913). See also Griffin v. Murdock, 88 Me. 254, 34 Atl. 30 (1896); Bailey v. Freeman, 4 Johns. (N. Y.) 280 (1809); Galway v. Rose, 6 Mees. & W. 291 (1840); Morse v. James, 11 Mees. & W. 831 (1843); Chitty, Pleading (16th Am. Ed.) *353; Stephen, Pleading (4th Am. Ed.) *269. Accord.

[24] The statement of facts is condensed, and only so much is printed as is necessary to an understanding of the portion of the opinion dealing with the question of duplicity.

STORRS, J. The first question in this case is whether the declaration sets out a good cause of action. * * *

The remaining question is whether it is bad for duplicity. The particulars in which it is stated, in the special demurrer, to be double, and which only we can consider on a demurrer for this cause, are that it sets up: 1. That the defendants enforced the execution issued on their judgment in the ejectment suit mentioned in it; 2, that they sold the personal property of the plaintiff, on said execution; 3, that they violated their promises to the plaintiff; and, 4, that they deceived and defrauded the plaintiff. That the declaration stated a good cause of action, on the last-mentioned ground, has been shewn. Whether any other is sufficiently set forth in the count, so that a judgment on it would be sustained on a writ of error, is very questionable. Perhaps, however, under the rules respecting duplicity, if the plaintiff has sought to recover for any other cause of action in that count, it would be no answer to that objection, that it is so imperfectly set forth, that, if it constituted a distinct count, it would be demurrable. But we have not considered it necessary to examine these questions, because we are of opinion that if any other cause of action is so stated in this count, that it would not be exceptionable either in substance or form, if contained in a distinct count, there is none so introduced into this declaration as to render it liable to the objection of duplicity. In order to constitute duplicity, it is not sufficient that a count in a declaration shows merely that the plaintiff has various causes of action against the defendant, although the contrary might be inferred from the general and loose definitions of duplicity, in some of the elementary treatises on pleading. It is necessary, further, that those various causes of action, or more than one of them, should be claimed and relied on as distinct grounds of recovery. Dyer, 42b; Stephen on Pl. 302. For, if it appears that the plaintiff seeks to recover upon only one of them, and makes no claim on any of the others, as a distinct, additional, or independent ground of recovery, the mere circumstance that he has other valid claims against the defendant, which he might, but does not, seek to enforce in the suit, ought not to deprive him of a recovery on the cause of action on which alone he seeks to recover. And in such a case there can be no multiplicity of issues to avoid which duplicity is discountenanced.

Nor is the introduction of facts in a count which would constitute a distinct cause of action considered as duplicity, where such facts are stated, not as a ground of recovery upon them, taken by themselves, but only as constituting part of the entire facts, or cause of action, on which the plaintiff relies for a recovery. According, in Bac. Ab. K. 2, duplicity is laid down to be, "Where distinct matters, not being part of one entire defence," or, it might be added, ground of recovery, "are attempted to be put in issue." The defendant cannot distort or vary the claim which the plaintiff has chosen to make, whatever it is, in

order to raise an objection to it. Nor does the statement of immaterial matter in a declaration make it double. Steph. Pl. 301. It is very common for the plaintiff, especially in action ex delicto, in connection with the facts on which he claims to recover, to state matters from which it appears that he has another cause of action against the defendant, either by way of amplifying or strengthening his description of the cause of action on which he relies; or, perhaps, from a mistaken idea that it is necessary to state, not only the main facts constituting his claim, but also the evidence of those facts and their attending circumstances; or to show the extent and aggravated character of the injury of which he complains; but, the statement of these matters being unnecessary and immaterial, it has never been considered that they rendered the declaration double, where it was apparent that he did not rest his claim to recover, upon them.

On an examination of the declaration of this case, we are satisfied that the claim of the plaintiff ought to be considered as founded on the fraud and deceit practiced on him by the defendants, in regard to the time limited for the redemption of the premises mortgaged by the plaintiff, and that the statement of the other matters which are claimed by the defendants as setting up other causes of action was made, not with a view of introducing any new or distinct ground of recovery, but only for the other purposes which we have mentioned. The conduct of the defendants, under their execution, in dispossessing the plaintiff of his land, and levying on his personal property, and the violation by the defendants of their promises, are evidently not introduced as distinct and independent causes of action, but for the purpose of showing the original fraudulent scheme of the defendants, the manner in which they carried it into effect, and the extent and character of the injury inflicted on the plaintiff. The objection of duplicity is therefore unfounded, and there is no error in the judgment complained of.

In this opinion the other Judges concurred, except HINMAN, J., who was disqualified.

Judgment affirmed.[25]

[25] Seaboard Air Line Ry. v. Rentz, 60 Fla. 449, 54 South. 20 (1910); Henry v. Heldmaier, 226 Ill. 152, 80 N. E. 705, 9 Ann. Cas. 150 (1907); King v. Estabrooks, 77 Vt. 371, 60 Atl. 84 (1905). Accord. Similarly a plea or replication is not double where all the facts alleged therein, no matter how numerous, combine to establish but one point. McDaniel v. Grace, 15 Ark. 465 (1855); Sanderson's Adm'r v. Thomas, 17 Fla. 468 (1880); Kimey v. Turner, 15 Ill. 182 (1853); Porter v. Brackenridge, 2 Blackf. (Ind.) 385 (1830); Bruce v. Mathers, 2 Bibb. (Ky.) 294 (1811); Potter v. Titcomb, 10 Me. 53 (1833); Hooper v. Jellison, 22 Pick. (Mass.) 250 (1839); Hunner v. Stevenson, 122 Md. 40, 89 Atl. 418 (1913); Horwitz v. American Surety Co., 83 N. J. Law, 402, 85 Atl. 219 (1912); Tucker v. Ladd, 7 Cow. (N. Y.) 450 (1827); City v. Wistar, 92 Pa. 404 (1880); McAleer v. Angell, 19 R. I. 688, 36 Atl. 588 (1897); Robinson v. St. Johnsbury, etc., Co., 80 Vt. 129, 66 Atl. 814, 9 L. R. A. (N. S.) 1249, 12 Ann. Cas. 1060 (1907). Accord.

STEPHENS v. UNDERWOOD.

(Court of Common Pleas, 1838. 4 Bing. N. C. 655.)

To an action on a bill of exchange, the defendant, the acceptor, pleaded that, before and at the time of making the acceptance, the defendant was unlawfully imprisoned by the plaintiffs, and others in collusion with them, and was then and there detained in prison, until by the force and duress of the said imprisonment he made the said acceptance; that he had never had any value for the said acceptance, or for paying the said bill of exchange, or any part thereof respectively; and that he was ready to verify.

Demurrer, for that the plea was double and multifarious, in this, that it contained two separate and distinct matters of defence to the said count, to wit, that the acceptance of the said bill in the said count mentioned was unlawfully obtained by the plaintiffs from the defendant by duress of imprisonment, and that there never was any value or consideration for the said acceptance; also for that the plea was so pleaded that the plaintiffs could not take or offer any certain issue thereon. Joinder.

TINDAL, C. J. It appears to me that this plea is bad, for the cause assigned in the special demurrer, viz. "that it contains two separate and distinct matters of defence, to wit, that the acceptance of the said bill was unlawfully obtained by the plaintiffs from the defendant by duress of imprisonment, and that there never was any value or consideration for the said acceptance." [26] The answer set up is that it is not bad because the second ground of defence is badly pleaded; but the plea is not the less double because one of the grounds of defence is badly pleaded. In Comyn's Digest, Pleader, E. 2, it is laid down that "a double plea is bad, though one matter or the other be not well pleaded; as in trespass, if the defendant pleads molliter manus imposuit and a release, it is double, though the release is not well pleaded. R. 1. Sid. 176. Though but one of the several matters pleaded be material. Per Dod. Poph. 186." Here, notwithstanding the second branch of the plea would be ill, on special demurrer, yet the entire plea is ill, for the cause assigned.

The court was about to give judgment for the plaintiff, when

Mansell prayed and obtained

Leave to amend.[27]

[26] Munro v. King, 3 Colo. 238 (1877); Bemis v. State, 3 Fla. 12, 16 (1850); Burrass v. Hewitt, 3 Scam. (Ill.) 224 (1841); Benner v. Elliott, 5 Blackf. (Ind.) 451 (1840); Scott v. Whipple, 6 Greenl. (6 Me.) 425 (1830); Dunning v. Owen, 14 Mass. 157 (1817); Dudley v. Spaulding, 50 N. H. 437 (1870); Connelly v. Pierce, 7 Wend. (N. Y.) 129 (1831); Luce v. Hoisington, 55 Vt. 341 (1883); Stanton v. Seymour, 5 McLean, 267, Fed. Cas. No. 13,298 (1851). Accord. The same rules apply to the replication and subsequent pleadings. See cases cited in 7 Encyc. Pl. & Pr. 241; 31 Cyc. 262.

[27] Conover v. Tindall, 20 N. J. Law, 513 (1845); Vaughan v. Everts, 40 Vt. 526 (1868); Stephen, Pleading (4th Am. Ed.) *259. Accord.

ROSENBURY v. ANGELL.

(Supreme Court of Michigan, 1859. 6 Mich. 508.)

Action of trespass for breaking and entering plaintiff's storehouse and carrying away and converting certain goods, the property of the plaintiff. Defendant pleaded the general issue, and gave notice that he would prove that at the time of the alleged trespass the storehouse and goods were the property of and in the possession of one Wilber, that defendant was sheriff of Livingston county, and took the property in question under certain writs of attachment. The notice fully described the writs, but made no mention of the affidavits which were by law required to be annexed to the writs.

On the trial defendant was permitted over plaintiff's objection to give in evidence the writs with the affidavits attached. Plaintiff excepted.

Verdict having been rendered for defendant, and judgment given thereon, plaintiff removed the cause to this court for review on exceptions.[28]

CHRISTIANCY, J. The first error relied upon in this case presents the question: 1st, whether, under the general issue, without notice, it was competent for the defendant to introduce in evidence the writs of attachment, with the affidavits annexed; and if not, 2d, whether the notice which accompanied the plea was sufficient to authorize the evidence in question.

It is contended by the counsel for the defendant that, as the defense set up in the notice denied both the property and the possession of the plaintiff, it was admissible under the general issue without notice. Doubtless this defense did amount to the general issue, without reference to the writs of attachment, and, if found for defendant, would render the writs entirely immaterial. But the proposition—that the writs were therefore admissible under the general issue—is circular, and its orbit and its fallacy may be readily demonstrated. Thus, if to authorize the evidence it be necessary to look to the defense set up in the notice, then the notice itself must be necessary. The question whether the proposed evidence was admissible under the general issue, without notice, is not to be determined by the defense set up in the notice, but by the nature of the evidence proposed —in all respects, as if no notice had been given.

It is well settled that, at common law, a justification of this kind, in an action of trespass, must be pleaded specially; and by the practice before the statute notice of it must have been given; and the statute (Comp. L. c. 124, § 24) requires a notice in all cases where a special plea or notice would have been required before. It is there-

[28] The statement of facts is condensed, and only so much thereof and of the opinion is printed as deals with the question of the admissibility of the writs and affidavits under the pleadings.

fore clear that the proposed evidence was not admissible under the general issue, without notice.

But, 2d, was the notice sufficient to warrant its introduction.

The only objection to the sufficiency of the notice in this respect is that it did not mention the affidavits required by law to be annexed, and which, in this case, were annexed, to the writs. And it is contended that, as the writs could be no justification without the affidavits, these were just as essential as the writs, and notice of them should have been given, to warrant their introduction, or that of the writs themselves.

The rule generally laid down as a test of the sufficiency of a notice under the general issue has been that the notice should contain all that would be necessary to sustain a special plea on general demurrer,[29] and such was the rule laid down by the Supreme Court of this state in Thompson v. Bowers, 1 Doug. (Mich.) 321. But this decision was not made under a statute like that applicable to the present case; and most of the decisions cited by counsel in support of the rule were under statutes or rules of practice differing somewhat from our present statute upon the subject. This statute, after having expressly abolished all special pleas in bar, enacts that, to entitle a defendant to avail himself of such matter of defense, he "shall annex to his plea of the general issue a notice to the plaintiff, briefly stating the precise nature of such matter of defense."

The objects of a special plea were twofold: 1st, To apprise the plaintiff of the nature of the defense relied upon, so that he might be prepared to meet it, and to avoid surprise on the trial; and, 2d, that an issue of fact might be formed upon it, or growing out of it, if the plaintiff chose to do so; or of law, if he chose to admit its truth by demurrer; and, as judgment on demurrer must be a judgment upon facts admitted on the record, by the parties in their pleadings, it was necessary the matters of fact should be set out with such certainty as to enable the court to decide without the necessity of finding, or supplying by intendment, facts not necessarily included in those thus admitted.

But the Legislature, in abolishing special pleas, have entirely dispensed with this last object of such pleas, requiring by the notice only the first, viz. that the plaintiff, by the notice, shall be apprised of "the nature of such matter of defense," that he may not be taken by surprise on the trial by a defense which he could not with reasonable certainty anticipate.

No issue is formed upon the notice; the only issue in the case is the

[29] Shepard v. Merrill, 13 Johns. (N. Y.) 475 (1816); McClintock v. Inskip, 13 Ohio, 21 (1844); Fowler v. Colton, 1 Pin. (Wis.) 331 (1843). Accord. See, also, Brickett v. Davis, 21 Pick. (Mass.) 404 (1838); Folsom v. Brawn, 25 N. H. 114 (1852); Thomas v. Mann, 28 Pa. 520 (1857); Randall v. Preston, 52 Vt. 198 (1879).

general issue.[30] The notice is of matters intended to be introduced under that issue.

Such being the only object of the notice, its sufficiency ought to be tested solely with reference to that object, rather than by reference to rules applicable to a demurrer to a special plea. The test of a general demurrer, it is true may, and in most cases probably would, produce the same result (as it certainly did in Thompson v. Bowers), but not necessarily in all cases; and, as in principle it is not the true test, we think it cannot be allowed to prevail where it comes in conflict with the test above indicated.

Did, then, the notice in this case sufficiently indicate the nature of the intended defense? Did it apprise the plaintiff, with reasonable certainty, that the affidavits annexed to the writs would be offered in evidence, and was the plaintiff likely in any way to be misled by the omission to mention them in the notice?

We think he was notified with reasonable certainty, and that he could not have been surprised by this omission. It is true defendant justified the taking under the writ, as he must, and not under the affidavits. But the notice of the writs, and the justification under them, ought, we think, for all purposes of such notice, to be held notice of every thing necessary to make them writs of attachment; and without the affidavits made on the same day, and substantially contemporaneous with the writs, the writs would have been waste paper; they would have been in no sense writs of attachment. See Buckley v. Lowry, 2 Mich. 418. When, therefore, the plaintiff received notice that the writs of attachment would be offered in justification, he must have anticipated the affidavits also, without which the writs could have no existence. To hold otherwise would be adopting a degree of technical nicety calculated to defeat, rather than to promote, the ends of justice.[31] * * *

BARDONS v. SELBY.

(Court of Exchequer Chamber, 1833. 3 Tyrwhitt, 430.)

TINDALL, C. J. This question, raised for our consideration upon this writ of error, arises in an action of replevin, in which Bardons,

[30] Curtis v. Gill, 34 Conn. 49 (1867); Bailey v. Valley National Bank, 127 Ill. 332, 19 N. E. 695 (1889); Leslie v. Harlow, 18 N. H. 518 (1847); McCutchen v. Nigh, 10 Serg. & R. (Pa.) 344 (1823). Accord. Corthell v. Holmes, 87 Me. 24, 32 Atl. 715 (1894). Contra.

[31] McRae v. Lonsby, 130 Fed. 17, 64 C. C. A. 385 (1904); Clement v. Garland, 53 Me. 427 (1866); Edwards v. Clemons, 24 Wend. (N. Y.) 480 (1840). Accord. See, also, Cook v. Miller, 11 Ill. 610 (1850); Bangs v. Snow, 1 Mass. 181 (1804). Some statutes are so drawn as to abolish special pleas; but usually notice under the general issue is permitted as an alternative. But both cannot be used in the same case. Camp v. Allen, 12 N. J. Law, 1 (1830); Powers v. Rutland R. Co., 83 Vt. 415, 76 Atl. 110 (1910).

one of the defendants below, avows as collector of a poor rate, and Jenkins, the other defendant, makes cognizance as his bailiff, alleging in the 4th avowry and cognizance that the plaintiff was an inhabitant of the parish, and by law ratable to the relief of the poor thereof, in respect of his occupation of a tenement situate within the same; that a rate for the relief of the poor of the said parish was duly ascertained, made, signed, assessed, allowed, given notice of, and published according to the statutes, and that by the said rate the plaintiff was duly rated in the sum of £7; that Bardons as collector gave him notice of the rate and demanded payment, which he refused; that the plaintiff was duly summoned to appear at the petty sessions to be held at a time and place duly specified, to show cause why he refused; that he appeared and showed no cause; that a warrant was thereupon duly made under the hands and seals of two justices of the peace for the county then present, directed to Bardons the collector, commanding him, according to the statute, to make distress of the plaintiff's goods and chattels; that the warrant was delivered to Bardons, under which he as collector avowed, while the other defendant acknowledged the taking of the goods, praying judgment and a return, etc. The plaintiffs pleaded in bar that the defendants of their own wrong, and without such cause as was alleged, took the plaintiff's goods and chattels. To this plea there was a special demurrer, assigning for cause that the plaintiff by his plea in bar sought to put in issue several distinct matters, and also that the plea in bar was pleaded as if the avowry and cognizance consisted wholly in excuse of the taking and detaining, and did not avow and justify the same and claim a return. The plaintiff below joined in demurrer. There were other avowries and cognizances pleaded in a similar form, to which similar pleas in bar were pleaded, and to which also there were special demurrers and joinders in demurrer. Upon argument before the court of King's Bench, judgment was given in favour of the plaintiff below by two of the learned judges of that court, the late learned and much-lamented chief justice, Lord Tenterden, having given judgment in favour of the defendants; and the question raised upon the record for determination is this: Whether the general plea in bar pleaded by the plaintiff below, by which all the several matters alleged in the avowry are put in issue, is a good plea in bar or not. And we are all of opinion that such plea in bar is a good plea, and that the judgment of the court below must be affirmed.

It may be convenient, in the first place, to advert to the objection which relates to the form of action in which this general plea is used, namely, that it is in point of form an action of replevin, not an action of trespass; as to which we are of opinion that no sound distinction can be made in that respect, but that wherever the facts pleaded in bar to an action of trespass for taking goods constitute such a defence, that the plaintiff may, consistently with the rules of law, put the whole of them in issue by the general replication de injuria sua propria

absque tali causa. We think the plaintiff may also do the same in his plea in bar to an avowry, stating the same identical facts as a defence in an action of replevin. No case has been cited before us in which such general traverse of the facts stated in the avowry has been held bad, simply upon the ground that the form of action is in replevin not trespass.[32] For as to the case of Jones v. Kitchen, 1 Bos. & P. 76, the general traverse there pleaded in bar to an avowry for a distress for rent, and which was held bad in that case, would have been equally held bad if it had been replied to a special plea in trespass, stating the same facts, as appears from the case of White v. Stubbs, 2 Saund. R. 294. It cannot therefore, as it appears to us, be a safe ground of decision to rest the validity of the general traverse on the present occasion, not upon the nature and character of the facts which are put in issue by such traverse, and upon the broad question whether they constitute one single defence or not, but upon the consideration that the question arises in an action of replevin. The only ground of distinction that has been suggested is that the defendant in this case, by claiming a return of the goods, asserts a right and property in them, and therefore brings the case within the exception in Crogate's Case "that the defendant claims property or an interest in or out of the goods which have been taken." But upon reference, as well to Crogate's Case, where this exception to the general rule is laid down, as also to the several cases in which such exception has been held to apply, we think it is limited to instances in which the defendant has claimed by his plea an interest in the land or goods, before and at the time of the trespass complained of. In replevin, however, it is obvious that the defendant does not insist, in ordinary cases at least, and certainly not in the present case, upon any right or interest he possessed in the goods, before the time of the taking complained of. In the instance of a distress for rent in arrear, the very nature of the transaction assumes that he has seized the goods which belonged to his tenant, the plaintiff, his sole object being to satisfy the rent out of the tenant's property, and the prayer for a return of the goods, etc., is no assertion of right to, or interest in the goods, in himself the defendant, but is a prayer that the plaintiff's goods may be returned by the sheriff, in order, so long as the common law on this subject continued, that they might be kept by the defendant as a pledge for the payment of the rent, and since the alteration of the common law by the statute 2 W. & M. c. 5, in order that they may be sold by the defendant in satisfaction of the arrears of rent and the expenses. Indeed it is evident that the claim of interest mentioned in Crogate's Case as forming an exception to the application of the rule there laid

[32] That the replication de injuria may be used to plea in excuse in trespass, case, replevin, assumpsit, covenant, and debt, see Stephen, Pleading (Williston's Edition) *191, and cases cited.

For full discussion of its use in plea in excuse as distinguished from plea in discharge, see Muttleberry v. Hornby, 6 U. C. Q. B. 61 (1849).

down must mean an interest anterior to and independent of the fact of seizure, from the instances which are there put, of a right of common, or a right of way or passage, and the like, all of which from their nature must have existed in the party before the trespass was committed for which the action was brought; we think therefore no distinction can be satisfactorily laid down between the rule of pleading as to the point in question, in an action of replevin and an action of trespass, but that the point to be determined is whether by the rules of pleading the several facts alleged in the 4th avowry might have been put in issue by the general traverse, if they had been contained in a plea in bar to an action of trespass?

And although it may be very difficult, upon principle, to account for such a departure from the general object which the rules of special pleading have in view, namely, that of bringing the matter in dispute between the litigant parties to one certain and single issue of fact, yet we think the present case falls within the authority of judicial decisions of an early date, and which have been constantly adhered to in late times, and we feel ourselves on that account bound by their authority, and no longer at liberty to found our judgment upon the ground of expediency, where the point in dispute is of a nature and description rather to be governed by precedent than by general principles of law.

It is not necessary to refer to any earlier decision than that of Crogate's Case, 8 Co. 67, as an authority upon the present question. Indeed the Year Books cited in that case do not, upon reference, throw much light or any degree of certainty on the points there resolved. But from the time of Crogate's Case (6th James 1) down to the present period, the resolutions of the court made in that case have as to the greater part been considered to be law.

In Crogate's Case the defendant, in an action of trespass for driving the cattle of the plaintiff, pleaded a right of common in a copyholder over the locus in quo, by prescribing in the usual way in the name of the lord of the manor; and because the plaintiff had wrongfully turned his cattle there, the defendant, as servant of the copyholder, and by his command, justified driving the cattle out. To this plea the plaintiff replied, de injuria sua propria absque tali causa; and upon demurrer it was adjudged that the general replication in that case was insufficient; and Lord Coke then proceeds to lay down four resolutions of the court, in the course of which he thus states the nature of this general plea, viz.: "The general plea de injuria sua propria, etc., is properly when the defendant's plea doth consist merely of matter of excuse, and of no matter of interest whatever."

The resolutions of the court are these four: 1st. That absque tali causa doth refer to the whole plea, and not only to the commandment, for all makes but one cause, and any of them without the other is no plea by itself. 2dly. It was resolved that, when the defendant in his own right, or as servant of another, claims any interest in the land,

or any common, or rent going out of the land, etc., there de injuria sua propria, etc., generally is no plea; but if the defendant justify as servant, there de injuria sua propria, etc., in some of the cases, with a traverse of the commandments, that being made material, is good. 3dly. It was resolved that when, by the defendant's plea, any authority or power is mediately or immediately derived from the plaintiff, there, although no interest be claimed, the plaintiff ought to answer it, and shall not reply generally de injuria sua propria; the same law of an authority given by law as to view, waste, etc. Lastly, it is resolved that in the case at bar the issue would be full of multiplicity of matter where an issue ought to be full and single, for parcel of the manor demisable by copy, grant by copy, prescription of common, etc., and commandment, will be all parcel of the same. The questions therefore appear to us to be these two alone: First, whether the facts pleaded in the avowry bring it within that description of plea to which the general replication is admitted in Crogate's Case to apply; and, secondly, whether the case falls within any of the exceptions laid down by the court in their resolutions in that case.

Now the facts stated in the avowry are the inhabitancy of the plaintiff in a certain parish, and his liability to the poor rate by reason of occupation; the making of a poor rate for the parish, with all the particular observances required by law; notice of the rate; the demand of payment and refusal to pay; the summoning before the justices of peace in petty sessions to show cause for his refusal, where no cause was shown; the issuing of a warrant by the justices of the peace; the delivery of the warrant to one of the defendants, and the distress made by him and the other defendant as his bailiff. In the first place these facts appear to us, in the language of Crogate's Case, to consist merely "upon matter of excuse, and of no matter of interest whatsoever." They fall within the principle of a justification under a proceeding in the admiralty court, the hundred or county court, or any other which is not a court of record, where de injuria, etc., generally is good, "for all is matter of fact, and all make but one cause," as is stated in another part of the same report. The case now under discussion resembles closely that which is last referred to; a justification under a distress warrant for a poor's rate must surely be the subject of general traverse, if a justification under the process of the admiralty court is held to be so.

It remains to be considered, therefore, whether the subject-matter of the avowry brings it within any of the exceptions which are laid down in the leading case above referred to. The first is where the defendant in his own right, or as servant to another, claims any interest in or out of the subject-matter of the action of trespass, in which case the general traverse would be bad. The interest there spoken of would include any title by lease, licence, or gift from the plaintiff (Bro. Abr. tit. De son tort demesne, 41); or any subdemise to the defendant (Id. pl. 53). The answer therefore to this objection appears

to be that the defendants in this case claim no subinterest, nor any other interest of any kind, in the goods taken. For that the exception applies only to the case of title or property in the goods, independently of any right conferred by the act of seizure, we have already stated to be our opinion, to which we refer. The next exception is where the defendant justifies under any authority or power, mediately or immediately derived from the plaintiff; in which case it is said that, although no interest is claimed, the plaintiff ought to answer it, and shall not reply generally de injuria sua propria. It would not have been necessary to have adverted to this exception, as the proceedings on the part of the defendants are manifestly not under any authority from the plaintiff, but directly against him, if Lord Coke had not proceeded to add "the same law of an authority given by the law, as to view waste." But the meaning of this distinction is explained by Lord Holt in the case of Chauncey v. Winn, 12 Mod. 582, who says, "the case of entering to see waste is upon a special reason, for suppose the lessor were seised in fee, such seisin in fee would be involved in the issue." That the dictum of Lord Coke cannot be intended of justification under all authorities in law generally is abundantly clear from the instances already adverted to of justification under process of law against the person and against the goods of the plaintiff; so also of justification by peace officers arresting upon breach of the peace and the like; so also in the case of justification under a statute (see Chauncey v. Winn, supra); in all which cases the general traverse is invariably replied to such pleas, where no matter of record forms part of it. If so, why may it not equally be replied where the justification is under a distress for a poor's rate being an authority of law?

The last of the exceptions mentioned in Crogate's Case is that the plea would be full of a multiplicity of matter. Whether or not this is a ground of exception that applies to the present case must depend upon the meaning of the word "multiplicity" in the resolution. If it intends that separate and distinct facts constituting altogether one defence cannot be included in the general replication, what becomes of the rule in Crogate's Case altogether? Why did the discussion in Crogate's Case take place? And why were the four resolutions made, when the single objection that the plea included more than one separate fact would have been sufficient to have determined against the general traverse? How is this interpretation reconcileable with the various instances in which this general form of replication is confessedly held good, such as the justification under process issuing out of a court not of record? Where facts are stated in the plea mixed up with matters of record, or with the claim of interest, or under the authority of the plaintiff, it has always been allowed that the plaintiff might admit the fact which falls within the description of such exceptions, and traverse the remainder of the allegations of the plea by uniting the traverse by the words "absque residuo causa."

How could this practice of pleading be applied to the present case, when none of the facts alleged fall within the exceptions, and all the facts are of the same nature? It follows, therefore, that such cannot be the meaning of the word "multiplicity," and consequently that the resolution does not apply to this case. And such appears clearly to have been the opinion of the court of King's Bench in two modern cases, Robinson v. Raley, 1 Burr. R. 316, and O'Brien v. Saxon, 2 B. & Cr. 908.

Upon the whole, we think this case falls within the general rule laid down in Crogate's Case, and that it is not touched by any of the exceptions there adverted to, and consequently that the judgment of the court below must be affirmed.

Judgment affirmed.[33]

SECTION 8.—PLEA AND DEMURRER

RICKERT v. SNYDER.

(Supreme Court of New York, 1830. 5 Wend. 104.)

Motion to strike out demurrers. The action in this case was brought to recover for the breach of the covenants of seisin and warranty contained in a deed of land executed by the defendant to the plaintiff. The declaration contains four counts, in each of the three last of which four breaches are assigned. The defendant pleaded non est factum to each count, and subjoined to his plea a notice that on the trial of the cause he would prove that at the time of the ensealing and delivery of the said several indentures he was seised, etc., and that he had good right, etc., to grant, etc., and that he had kept and performed his covenants, etc., and that the plaintiff from the time of the ensealing and delivery, etc., had peaceably and quietly held and enjoyed, etc. The defendant also demurred to the fourth breach contained in the three last counts of the declaration. The plaintiff proceeded

[33] See note to Crogate's Case in 1 Smith's Leading Cases (5th Am. Ed.) 201 et seq.

"The general replication de injuria sua propria absque tali causa is bad where the defendant justifies or insists on a right, and is good only where he pleads matter of excuse." Sutherland, J., in Coburn v. Hopkins, 4 Wend. (N. Y.) 577, 578 (1830).

"We are aware of numerous decisions in this country to the effect that the replication de injuria is only a good replication where the plea sets up matter of excuse, and is not good where the plea sets up matter of justification, though the justification be under process from a court not of record, or rest upon some authority of law other than a judgment of a court. Such are the decisions of the Supreme Court of New York, and they proceed upon the supposed doctrine of the resolutions in Crogate's Case. But an examination of that case will show that the doctrine is not supported to the extent laid down in the New York decisions." Field, J., in Erskine v. Hohnbach, 14 Wall. 613, 618, 20 L. Ed. 745 (1871).

to trial on the issue of fact before the rule to join in demurrer expired, and obtained a verdict for $281.69, and now moved to strike out the demurrers.

By the Court, SAVAGE, C. J. There cannot be a demurrer and a plea to the same part of a declaration. 1 Chitty, 230. The plea of non est factum, with the notice of special matter set up in this case, is equivalent to a special plea to each breach, and having pleaded to the whole declaration, the defendant cannot also demur. The motion is granted with costs.[34]

SECTION 9.—ARGUMENTATIVENESS

BENHAM v. EARL OF MORNINGTON.

(Court of Common Pleas, 1846. 3 Man. Gr. & S. 133.)

Debt, on a bond, bearing date the 23d of August, 1833, in the penal sum of £800.

Plea, that the supposed writing obligatory in the declaration mentioned, was made and executed by the defendant as therein mentioned, in parts beyond the seas, to wit, at Calais, in the kingdom of France, where the defendant was then resident and domiciled, and not elsewhere; that the said writing obligatory in the declaration mentioned,

[34] Gayle v. Smith, Minor (Ala.) 83 (1822); Hair v. Weaver, 1 Blackf. (Ind.) 77 (1820); Edbrooke v. Cooper, 79 Ill. 582 (1875), semble; Cicotte v. Wayne County, 44 Mich. 173, 6 N. W. 236 (1880), semble; Gwin v. Mandeville, 17 Miss. (9 Smedes & M.) 320 (1848), semble; Truesdale v. Straw, 58 N. H. 207 (1877); Reid v. Providence Journal Co., 20 R. I. 120, 37 Atl. 637 (1897), semble; Bac. Abr. Pleas., K., 1, 3; N. 1. Accord.

The same rule applies to replications. Riley v. Harkness, 2 Blackf. (Ind.) 34 (1826); Chesapeake, etc., Co. v. American Exchange Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449 (1896).

In some jurisdictions demurrer and plea to the same count are permitted by statute. See Hobson v. Satterlee, 163 Mass. 402, 403, 40 N. E. 189 (1895); Chesapeake, etc., Co. v. American Exchange Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449 (1896).

In Haiton v. Jeffreys, 10 Mod. 280 (1714) defendant moved the court for leave to plead a plea and demur to the declaration at the same time. The court in denying the motion said: "The words of the act of parliament are 'that it shall be lawful to plead as many several matters,' etc. Now a demurrer is so far from being a plea that it is an excuse for not pleading. Here you plead, and at the same time pray that you may not plead. The word 'matter' imports a possibility that the other party may demur to it; but there can be no demurrer upon a demurrer. This was never attempted before."

Defendant may demur to one count and plead to others. Patterson v. Wilkinson, 55 Me. 42, 92 Am. Dec. 568 (1867); Harwood v. Tompkins, 24 N. J. Law, 425 (1854). A party may demur to a part of a declaration or count and plead to the residue, if the matter be severable. Nave v. Berry, 22 Ala. 382 (1853), semble; Wyant v. Smith, 5 Blackf. (Ind.) 293 (1840); Edes v. Garey, 46 Md. 24 (1877). Accord. Pettibone v. Stevens, 6 Hill (N. Y.) 258 (1843). Contra.

was not taken, received, made, or passed by any public officer or officers of the said kingdom of France, authorized by the laws of that kingdom so to do, nor was the same writing written throughout by the hand of the defendant; that, although the defendant signed the said writing with his own hand, yet the defendant did not, in any part of the said writing, write with his proper hand the formula or acknowledgment styled in the French tongue a "bon," or "approuvé," bearing in words at length the debt or sum of money purporting to be secured or acknowledged by the said writing, nor was the defendant, at the time of the making of the supposed writing obligatory, a merchant or tradesman, artisan, husbandman, ploughman, vine cultivator, labouring man, or servant; and that, by reason of the premises, the said supposed writing obligatory, by the laws of the said kingdom of France, never was nor is obligatory or binding on the defendant, but always was and is of no force, effect, or validity—verification.

Special demurrer, assigning for causes that the plea did not state facts with distinctness and certainty, so that the court could perceive that the writing obligatory was void according to the law of France at the time it was executed, that the plea merely stated, as an inference from certain preceding matters, that the writing obligatory never was binding, that the plea ought to have averred, in terms, what was the existing law in France at the time the writing obligatory was executed, and then, by proper averments, to have shown facts which brought the writing obligatory within that law. * * *[35]

TINDAL, C. J. It appears to me that this plea is bad for one of the causes assigned, viz. that it is argumentative and inferential only; whereas "every plea must be direct, and not by way of argument or rehearsal," as is laid down in Co. Lit. 303a. It is perfectly clear, that, but for the words at the end—"by reason of the premises, the said supposed writing obligatory, by the laws of the said kingdom of France, never was, nor is, obligatory or binding on the defendant, but always was, and is, of no force, effect, or validity"—the plea would be no answer to the action. There is no direct affirmance of what the law of France is, or of any state of facts to bring this case within the operation of that law. I think the plaintiff was entitled to a distinct statement of the law and of the facts, in order that he might take the opinion of the court as to whether or not they amounted to a legal defence. If this had been a question of evidence, instead of pleading, the witness would not have been allowed to state, negatively, this or that is not in compliance with the law of France; but he would have been required to show affirmatively, from his own experience, or from knowledge derived from some recognised code or book, what the law is. The entire plea, after the introductory statement of the defendant's domicil, consists of negative propositions only. With re-

[35] Part of the statement of causes of special demurrer is omitted. The concurring opinions of Coltman and Creswell, JJ., are also omitted.

spect to the allegation that the defendant was not a merchant or tradesman, etc., how do we know that there are not other classes embraced by the exception that are not noticed by the plea, and to one of which the defendant may belong? I think the plea is clearly argumentative and bad. As to M'Leod v. Schultze, it may be observed that a case in which either party is recommended to withdraw his plea, or demurrer, and amend, cannot be considered a very strong authority; besides, the plea there consisted entirely of affirmative matter, and therefore stands clear of one of the difficulties that this plea presents. In Woodham v. Edwardes, the objection was not taken, the plaintiff having pleaded over. Upon the whole, I think the plaintiff is entitled to judgment on this plea.

Judgment for the plaintiff.

BEATTY v. PARSONS.

(Superior Court of Delaware, 1910. 2 Boyce, 134, 78 Atl. 302.)

PENNEWILL, C. J.[36] In the above-stated case the plaintiff in his narr. alleges that the title to the property in question is in himself.

To the declaration of the plaintiff, the defendant filed certain pleas, one of which is as follows:

"And the said Elisha S. Parsons comes and further defends the wrong and injury when, etc., and says that the said plaintiff ought not to have and maintain his action aforesaid against him, because he says that the property of the goods and chattels in the declaration of the said plaintiff mentioned, at the said time, etc., was in one Harry C. Ramsberger and not in the said plaintiff as by the declaration aforesaid is supposed. And this he is ready to verify, etc."

To said plea the plaintiff replied as follows:

"And the said plaintiff, as to the third plea of the said defendant above pleaded saith: That he by anything in the said third plea alleged from having and maintaining his action as aforesaid to be precluded ought not, because he says that the property of the goods and chattels in his declaration at the time of taking the said goods and chattels, was in him, the said plaintiff, as he, by his declaration aforesaid thereof hath alleged, and this he prays may be inquired of by the country."

To this replication the defendant demurred, stating and showing "the following cause of demurrer, that is to say, that said replication neither traverses, confesses or avoids, nor otherwise answers the plea of said defendant of property of the goods and chattels in the declaration of the said plaintiff mentioned in one Harry C. Ramsberger."

The question raised by the demurrer, therefore, is the sufficiency of the plaintiff's replication.

[36] A portion of the opinion is omitted.

In volume 2 of Harris' Modern Entries, 97, is found the following form of a plea of property in a stranger, in an action of replevin:

"Because he saith that the property of the aforesaid three cows in the declaration aforesaid specified, at the said time, when, etc., was in one C. D. and not in the said P. as by the declaration aforesaid is supposed; and this, etc."

In a note following said plea, and also a plea of property in the defendant, it is said:

"Although the last two pleas are usually pleaded together, the issue on them both is one and the same; the only question being whether the goods are the property of the plaintiff, since, if they are not, he can have no right to disturb the possession of the defendant. These pleas are special traverses. 1 Williams' Saunders, 22, note 2. In this case the fact alleged in the declaration, that the goods are those of the plaintiff, is 'a material fact which will decide the cause one way or the other,' and is therefore well traversed. * * * The issue is therefore to be joined on the traverse of the plaintiff's property, and the only proper replication in both cases is that given hereafter under the title 'Replication,' which was put in by the late John Thompson Mason, Esq., in Glasgow v. Dorsey, the record of which case is in 2 Harris' Entries, 246, etc. See to the same effect Cullum v. Bevans, 6 Har. & J. (Md.) 472. Mr. Harris has given, on page 471, a form of replication irreconcilable to the rules of pleading, being a traverse of the inducement of the special traverse, that the goods are the property of the defendant, and a reiteration of the allegation that they are that of the plaintiff; but the inducement cannot be traversed, and the onus probandi by that means changed, for such is its effect. The issue even then is on the affirmative of the reiterated allegation, and the negative of the original traverse. The form in Harris is also bad for duplicity, since it presents two issues, viz.: Whether the goods are those of the plaintiff, or whether they are those of the defendant. There seems to be no sound reason why the inducement should not be dismissed from practice, and the same issue attained in a shorter mode by a common traverse of the fact of the plaintiff's property." The foregoing note is by Hugh Davey Evans, Esq., who newly arranged the compilation of Harris' Entries, making additions and improvements thereto.

In volume 2 of Harris' Entries, 239, is found the replication which is stated in said note to be the only proper replication in an action of replevin to a plea of property in defendant, or property in a stranger, and it is in the following language:

"And the said plaintiff, by his attorney aforesaid, as to the second plea of the said defendant, saith that he, by anything in the said second plea alleged, from having and maintaining his action aforesaid to be precluded ought not, because he saith that the property of the said negro slaves called James and Harry (or the goods and chattels afore-

said), at the time of taking the said negroes (or goods and chattels), was in him, the said plaintiff, as he by his declaration aforesaid thereof hath alleged, and this he prays may be inquired of by the country."

It will be noted that the plea filed in the present case is practically identical with the one above quoted from Harris' Entries, and that the replication filed here is similar to that which is approved in Harris' Entries, and declared in the said note to be the only proper replication to such a plea. The contention of the defendant is that the plaintiff should have traversed the plea, not in the common form, but by a special traverse.

Mr. Stephen in his work on Pleading (Tyler's Edition 1871) 184, 188, 189, 197, 199, says:

The affirmative part of a special traverse is called its inducement; the negative is called the absque hoc. * * * The different parts and properties here noticed are all essential to a special traverse, which must always consist of an inducement, a denial, and a verification. * * *

"The general design of a special traverse, as distinguished from a common one, is to explain or qualify the denial, instead of putting it in the direct and absolute form. * * *

"Again, it is a rule with respect to special traverse that the opposite party has no right to traverse the inducement, or * * * that there must be no traverse upon a traverse. * * *

"As the inducement of a special traverse, when the denial under the absque hoc is sufficient, can neither be traversed, nor confessed and avoided, it follows that there is in that case no manner of pleading to the inducement.

"The only way, therefore, of answering a good special traverse, is to plead to the absque hoc, which is done by tendering issue on such denial; * * *" that is "to tender issue upon it, with a repetition of the allegation traversed."

We assume that the correctness of these general principles will not be disputed, and will endeavor to apply them to the present case.

The special traverse may be employed in a plea as well as in a replication, and that is exactly what we think the defendant has done in this case. That which he insists the plaintiff should have done in his replication he has done in his plea. It is averred in such plea that the property was in a stranger, and that part of a special traverse is called the inducement, and only indirectly, or argumentatively, denies the allegation in the declaration that the property was in the plaintiff. The plea also avers that the property was not in the plaintiff, and that part of the special traverse is called the absque hoc. It is a direct denial that the property was in the plaintiff, which is the only thing that could be traversed by the plea.

To constitute a special traverse by the absque hoc it is not necessary that the words "without this" should be employed. It is the same if

the words "and not" are used. The defendant's plea being a special traverse, and by the absque hoc, what should the plaintiff in his replication do? That is the question we have to decide. Certainly he should not, and could not, traverse the inducement of the plea, which is that the property was in a stranger, to wit, one Harry C. Ramsberger. He was compelled to take issue on the denial in the plea that the property was in the plaintiff. That is what the plaintiff has done in his replication, following exactly the form set out in Harris' Entries, and above quoted.

We are of the opinion that the replication is good and sufficient in law, and think no authority can be found to the contrary. * * *[37]

SECTION 10.—RECITALS

BROWN v. THURLOW.

(Court of Exchequer, 1846. 16 Mees. & W. 36.)

Case for slander. Declaration stated, for that whereas the defendant, contriving, etc., heretofore, to wit, on, etc., in a certain discourse which the defendant then had of and concerning the plaintiff, in the presence and hearing of divers good and worthy subjects of the Queen, falsely and maliciously spoke and published of and concerning the plaintiff the false, scandalous, and malicious, and defamatory words following: "Bill Brown (meaning the plaintiff,) you are a sheep-stealer. I can prove you are a sheep-stealer at any day or one time." The declaration then alleged special damage to the plaintiff, by means of the premises, in his trade and business of a cattle dealer.

Special demurrer, assigning for causes that the defendant is not by the said declaration positively charged with having committed the grievances in the declaration mentioned, but it is therein alleged by way of recital only that the defendant has committed the said grievances, and not directly and positively, as it ought to have been; and that nothing is directly or positively affirmed or charged in the said declaration; and also that it does not appear by the said declaration that the words, "Bill Brown, (meaning the plaintiff,) you are a sheep-

[37] If the inducement is insufficient in substance, the entire plea is bad on general demurrer. Fox v. Nathans, 32 Conn. 348 (1865); People v. Pullman, etc., Co., 175 Ill. 125, 51 N. E. 664, 64 L. R. A. 366 (1898); Allen v. Stevens, 29 N. J. Law, 509 (1861). If the inducement, though sufficient in substance, be other than an indirect or argumentative denial, the plea is bad on special demurrer. Finley v. Woodruff, 8 Ark. 328 (1853), semble; Hubbard v. Mutual Reserve Fund Life Ass'n (C. C.) 80 Fed. 681 (1897), semble; Stephen, Pleading (Williston's Ed.) *212 et seq.

stealer," etc., were spoken or published of or to the plaintiff. Joinder in demurrer. * * *[38]

Needham, in support of the demurrer.—It is a general rule of pleading that every material averment must be alleged with certainty: thus matter of inducement may be placed under a "whereas," but the positive charge must not. In Bac. Abr. tit. Pleas and Pleading, B. 4, it is said, "the declaration must contain such certain affirmation that it may be traversed; for if there be no certain affirmation to make the declaration itself traversable, it will not be cured after a verdict, because it is a defect in substance; as if the declaration be 'quod cum the defendant assaulted him,' and the defendant pleads not guilty, here is nothing put in issue, for the pleadings have affirmed nothing, and though the defendant is found guilty, yet cannot the plaintiff have judgment, because nothing is positively affirmed." In Comyns's Digest, tit. Pleader (C. 50), it is said, generally, that "the plaintiff in his declaration ought to aver all that is necessary for the maintenance of his action." Subsequent editors have added, by way of illustration, the case of Smith v. Reynolds, Andrews, 21, thus stated: "If a declaration in assault and battery begins with 'quod cum,' it is bad for want of averment." Though the instances quoted in both abridgments are in trespass only, the same reasoning applies to other actions, including actions on the case; for though the precedents in those forms of action begin with 'quod cum,' by way of recital, the material part, the grievance, or gravamen of the charge, is invariably alleged in positive terms. Nor is Ring v. Roxbrough, 2 Cr. & J. 418, 2 Tyr. 468, to the contrary, where it was held, in assumpsit, that an averment of promise under a 'whereas' is good on general demurrer, for it is included in the subsequent sentence, which alleges by way of positive affirmation, that the defendant has disregarded his promises, and has not paid the money due. Bayley, B., said: "There is no special cause of demurrer on this ground, and it cannot be matter of substance. But in the common form of a declaration on a bond all the contract is stated under a whereas." Lord Lyndhurst, C. B.: "It states shortly, whereas defendant became bound, yet he did not pay:" 2 Cr. & J. 418. [ALDERSON, B. This question could only have been raised on special demurrer. We have no doubt of the rule in trespass, or of the general principle of pleading, but if the course of precedents in actions on the case is the other way, we should be careful not to disturb them.] What in this action corresponds to the breach in assumpsit, is the actual charge, or gravamen. From the precedents of declarations in case for keeping mischievous animals, public nuisances, malicious arrests and prosecutions, slander, verbal and written, enticing away apprentices, negligence, escapes, etc., it appears that, though matter purely inducement is laid under the recital quod cum, the grievance is invariably laid in direct terms, e. g., under "yet." It is true, the

[38] A portion of the statement of facts is omitted.

precedents in actions for criminal conversation, and in some actions for deceit, allege the whole by way of recital, under the "quod cum," without any change of phrase, except "and thereby;" but, as special damage is the gist of these actions, those words may effect a sufficient interruption of the previous recital. [ALDERSON, B. I do not know that it has ever been held on special demurrer, that, in an action on the case for criminal conversation, it would suffice to lay the charge under a "whereas."] * * *

Peacock, contra.—Whatever the rule may be in trespass for a direct injury, it is enough, in an action on the case for words, to state distinctly that they were spoken by the defendant. That is here done; for the recital under the "quod cum" is confined to the contriving, etc., by the defendant. In actions on the case for seduction and criminal conversation, the whole charge is laid under it. Serjt. Stephen, in his work on Pleading, c. II, § 5, rule 5, after stating that pleadings must not be by way of recital, but must be positive in their form, adduces as an example of this kind of fault the use of "for that whereas" in trespass for assault, instead of "for that," but adds, "it will be observed, however, that, in trespass on the case, the 'whereas' is unobjectionable, being used only as introductory to some subsequent positive allegation." [ALDERSON, B. Here is no subsequent positive allegation to which the matter under the "whereas" is an introduction. PARKE, B. Does not the same principle apply in all cases where a direct averment is necessary? Here there is no direct allegation that the defendant spoke the words, except in an inverted manner: Sherland v. Eaton, 2 Bulstrode, 214. "Quod cum" is not direct affirmation. Ring v. Roxbrough was in assumpsit, following the precedent given in the rules prepared by the judges.[39] PARKE, B. The breach in that case contained a direct allegation that, disregarding his promise, he had not paid.] Mr. Baron Bayley seemed to think the declaration would be good on special demurrer. [ROLFE, B. There is nothing recondite in the matter. This plaintiff complains, for that whereas the

[39] "The second or common count for money had and received is good in this case. It is objected to because the consideration for the promise and the promise itself is stated after a whereas. It is unquestionably true that it is a general rule of pleading that whatever facts are necessary to constitute the cause of action should be directly and positively stated in the declaration, and not by way of recital; but, though this rule be apparently violated, it has been expressly decided by the court that if in assumpsit in this common indebitatus count the promise is stated after a whereas, though the promise is the very gist of the action, yet such a count so framed, will be held good on demurrer. See Burton & Co. v. Handsford, 10 W. Va. 470, 27 Am. Rep. 571 (1877).

"This conclusion was reached because this was the manner in which the judges of England had prescribed for such a count in an action of assumpsit; and they decided that such a mode of stating the promise in such a count was good, independently of their having prescribed this as its proper form." Green, J., in Sheppard v. Peabody Ins. Co., 21 W. Va. 368, 377 (1883). See, also, Upper Canada College v. Boulton, 2 U. C. C. P. 326, 335 (1852); Falconer v. Campbell, Fed. Cas. No. 4620, 2 McLean, 195 (1840). Accord.

defendant spoke the words. What then? Nothing more. In trespass, the mere statement of the grievance shows it to be such; whereas, in case, some introductory matter is required to show it a grievance.] Trespass lies for the direct act of injury, and case for the consequential damage. [PARKE, B. What you complain of must be averred directly, and with certainty. That rule of pleading cannot vary in the different forms of action. Had these words not been actionable in themselves, the damage would have been consequential only. The precedents in case for criminal conversation and seduction are comparatively modern. The old form was in trespass for assaulting and seducing the wife or daughter, per quod consortium or servitium amisit. The "quod cum" is allowed in case, because in that form of action recitals generally occur. A declaration in case for criminal conversation might recite that, whereas A. B. was wife of the plaintiff, yet the defendant seduced her, etc.]

POLLOCK, C. B. The word "whereas" overrides the whole of this declaration, including the special damage, as if it had been repeated, and has not been exhausted. The gravamen of the charge is only stated by way of recital and inducement, nor is any positive averment interposed till the concluding one, that the plaintiff brings his suit. That is a defect available to the defendant on special demurrer. The declaration is, therefore, bad on special demurrer.

PARKE, B. I entirely concur. In trespass, the matter complained of is positively averred without a preceding "whereas;" and though in the action on the case recitals generally occur, there must notwithstanding be a positive averment of the cause of action. Here the plaintiff does not positively or directly aver the cause of his action. This defect is, in reason, equally contrary to the true principles of pleading, whether it occurs in case or trespass. Had it appeared by a long course of precedents that averring the cause of action by way of recital, and not positively or directly, had been considered sufficient, a form of pleading thus established would have bound us; but, in the absence of any such authority, the clear principle to the contrary must prevail.[40]

Judgment for the defendant.[41]

[40] The concurring opinion of Rolfe, B., is omitted.

[41] "The second count is clearly bad because the facts are all recited under a whereas. Such defects are not mere defects in form, but in substance, and are condemned by all the authorities. Spiker v. Bohrer, 37 W. Va. 258. See, also, 11 Ency. Dig. Va. & W. Va. Rep. 239; Id. 831; 15 Ency. Dig. Va. & W. Va. Rep. 808." Miller, P., in Gould v. Coal & Coke Ry. Co., 74 W. Va. 8, 81 S. E. 529 (1914).

SECTION 11.—HYPOTHETICAL PLEADING

GRIFFITHS v. EYLES.

(Court of Common Pleas, 1799. 1 Bos. & Pul. 413.)

This was an action of debt for an escape out of execution, against the defendant as warden of the Fleet. Pleas: 1st, nil debet; 2d, that the escape was without the knowledge, privity, consent or permission of the defendant, and against his will, and that before he knew of the escape and before the filing of the bill the prisoner voluntarily and of his own accord returned back into the custody of the defendant, and continually from thenceforth hitherto hath been and still is there kept and detained in execution at the suit of the said plaintiff.

[The plaintiff in his replication joined issue on the first plea, and to the second plea put in what amounted to a denial. To the replication to the second plea defendant interposed a double rejoinder to which plaintiff demurred specially.] [42]

The court, however, gave the defendant leave to amend on payment of costs, intimating, at the same time, that it must be done in such a way as not to preclude the question being brought to issue as soon as possible.

Accordingly, the defendant amended his second plea by inserting an allegation "that if the said prisoner did at any time or times after the said commitment, etc., go at large from and out of the said prison of the Fleet, and from and out of the custody of him the said defendant, he, the said prisoner, so escaped and went at large privately, and without the knowledge, etc., of him, the defendant, and against his will; and that if any such escape or escapes was or were so made, the said prisoner after such escape or escapes, and before the defendant knew of such escape or escapes and before the filing of the bill, voluntarily and of his own accord returned back again into the custody of the defendant, and continually from thence forth until and at the time of the commencement of the suit was, and hath been, and still is, kept and detained," etc.

Upon this Le Blanc again applied to the court, and contended, that this plea by no means complied with their injunction, and was so framed as to afford no probability of any issue.

EYRE, C. J. The defendant knows and is bound to know the state of his prison, and whether there has been an involuntary escape and subsequent return and safe keeping of the prisoner since that time, or whether there has been no escape at all. If there has been one

[42] The statement of facts is abridged.

escape and one return, or if there have been ten escapes and ten returns, and the defendant thinks fit to plead them, and to insist, that independent of such escapes the prisoner has been kept in safe custody, he is at liberty to do so. But he cannot plead hypothetically, that if there has been any escape there has also been a return. He must either stand upon an averment that there has been no escape, or that there have been one, two or ten escapes, after which the prisoner returned, and that having kept him in custody since that time, he is entitled to give that answer to the plaintiff's charge. The defendant must take upon himself to state the escapes specifically, that the plaintiff may have an opportunity of combating his assertion. With respect to the plaintiff's replication, it never abandoned the escape laid in the declaration. To that escape the defendant pleaded what was an answer as far as it went; in reply to which the plaintiff admitted the fact of the defendant's plea, but added that he did not complain of the escape previous to the return, but that the defendant had not kept the prisoner in custody since that return.

The court again gave the defendant leave to amend, by striking out the latter part of the rejoinder which had been demurred to, and leaving the traverse of the allegation, that after the return of the prisoner, and after notice of the former escape, the defendant voluntarily permitted the prisoner to escape.[43]

[43] Stephen, Pleading (Williston's Ed.) *426, 427, and cases cited. Accord. Cf. Suit v. Woodhall, 116 Mass. 547 (1819).

CHAPTER III

OBJECTIONS TO DEFECTS

SECTION 1.—DEMURRERS

LAMPHEAR v. BUCKINGHAM.

(Supreme Court of Errors of Connecticut, 1866. 33 Conn. 237.)

Action on the 544th section of the statute with regard to corporations (Revision of 1866, p. 202), which provides that, in case the life of any passenger on a railroad who is in the exercise of reasonable care shall be lost by the negligence of the railroad company, the company shall be liable to pay damages not exceeding five thousand dollars and not less than one thousand dollars, to be recovered by the executor or administrator in an action on the statute, for the benefit of the husband or widow and heirs of the deceased.

The defendants demurred to the declaration. The demurrer was overruled. Upon the hearing in damages, the court found that, if the law was so that plaintiff could not recover a less sum in damages than one thousand dollars, the plaintiff should recover that sum; but if the law was so that plaintiff could recover less than one thousand dollars, then plaintiff should recover only nominal damages, which the court assessed at fifty dollars. The question whether the court had the power to assess the damages at a less sum than one thousand dollars was reserved for the advice of the Supreme Court of Errors.[1]

BUTLER, J. The only question reserved for our advice by the superior court on this record is "whether under the statute on which this action is brought the court has power to find and assess the damages in the case at a less sum than one thousand dollars." As the statute is express both as to the minimum and maximum of damages, it would seem too clear for argument that, "under the statute," to use the language of the court, the minimum sum fixed by it at least must be recovered.

But the counsel for the defendants, in an ingenious and elaborate argument, seek to avoid a recovery for more than nominal damages, on the ground that the case can and should be taken from the operation of the statute and treated as an action at common law. The points

[1] This short statement is substituted for that found in the official report. A portion of the opinion is omitted.

which they make are presented with great apparent confidence, and we will consider them fully in the order in which they are presented:

1. First then, the defendants claim that the declaration does not disclose a cause of action under the statute, and does contain one at common law. They say that an action does not lie under the statute against the trustees.

The original eighth section of the act of 1853 (Laws 853, p. 132) authorized the action against the railroad company only. But we are of opinion that the act of 1858, which authorized and regulated the surrender of the road and franchise to trustees for the benefit of creditors, subjected the property in the hands of such trustees to liability, and them to a suit under this statute. * * *

3. The defendants insist, in the third place, that if the demurrer admits a statutory cause of action it admits no specific facts as facts, and therefore admits no statutory negligence, and no right except the mere right to recover nominal damages. This involves an inquiry into the nature and effect of a demurrer. There has been much discussion respecting them in this court and elsewhere during the last few years, and still they do not seem to be clearly understood. The defendants certainly have misapprehended them. The misapprehension has probably arisen from the inaccuracy of the usual expression, "a demurrer admits," etc. Strictly speaking a demurrer does not admit anything and in order to express more clearly, and so that they cannot be misunderstood, the views held by this court, it seems necessary to recur to first principles.

Every action at law to redress a wrong or enforce a right, if properly instituted, is a syllogism, of which the major premise is the proposition of law involved, and the minor premise the proposition of fact, and the judgment the conclusion. Blackstone states it thus (Com. vol. 3, p. 396): "The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination or sentence of the law. It is the conclusion that naturally and regularly follows from the premises of law and fact, which stand thus: Against him who hath rode over my corn I may recover damages by law; but A. hath rode over my corn; therefore I shall recover damages against A." Usually the major premise is not set out in the declaration, but the proposition claimed is implied from or involved in the facts stated. The plaintiff in an action of tort, for instance, summons the defendant to answer, for that at a cetrain time and place he committed in a certain manner a certain wrong, to the plaintiff's damage, etc., and by so doing impliedly claims that the law is so that he is entitled on those facts to recover. To this syllogism the defendant must answer according to the rules of law. If he expressly admits on the record the law and the fact, both premises, he consents to the conclusion, the judgment, or, as it is technically expressed, "confesses judgment." If he declines or omits to appear pursuant to the summons, or appear-

ing declines or omits to answer when called upon to do so, he impliedly admits both propositions or premises to be true by his default, and judgment follows technically, as a judgment by default, pursuant to a necessary rule of law stated broadly by Mr. Taylor (Ev. 669) thus: "Whenever a material averment well pleaded is passed over by the adverse party without denial, whether it be by pleading in confession and avoidance, or by traversing some other matter, or by demurring in law, or by suffering judgment to go by default, it is thereby, for the purpose of pleading if not for trial before the jury, conclusively admitted. So the defendant may traverse or expressly deny the facts or the minor premise, and will be held on the same principle to have admitted the major, and, if the minor is found true, judgment—the conclusion—is awarded on the verdict. And so he may deny the major premise, the proposition of law involved by a demurrer, and failing thereby to deny and passing over the facts, if well pleaded and sufficient to constitute a premise, he defaults as to them, and thereby and by the same rule is holden to have admitted them; and if the issue in law is found true, final judgment passes for the plaintiff. The facts if well pleaded and sufficient are admitted,[2] not because the demurrer admits them expressly or by force of any office it performs, but because the defendant has not denied and has defaulted them. A defendant therefore who demurs to a declaration admits, not by his demurrer, but by his omission to deny them, all the material well pleaded facts alleged in it;[3] and when his demurrer is overruled the case is in the same condition precisely that it would have been if he had suffered a default and not demurred. All the difference between the two is that in one case he denied the major premise of law and it has been found true, and, the minor having been admitted by a failure to deny, both are to be holden true; in the other he denied neither, and therefore both are to be holden true.

The condition of a case before the court after demurrer overruled and after default being precisely the same, and the effect of demurring or defaulting being precisely the same in admitting the facts, the question as to both is answered by what the law is as to either. What then is the effect of a default? What facts does it admit? It has been said by some writers and judges that it admits *the* cause of

[2] For numerous cases accord, see 6 Encyc. Pl. & Pr. 334; 31 Cyc. 333.

[3] A demurrer does not admit facts which are not well pleaded—e. g., immaterial allegations. Scovill v. Seeley, 14 Conn. 238 (1841); Stinson v. Gardiner, 33 Me. 94 (1851); Brooke v. Widdicombe, 39 Md. 386 (1874); Amory v. McGregor, 12 Johns. (N. Y.) 287 (1816); allegations shown by the record to be untrue, Tresham v. Ford, Cro. Eliz. 830 (1601); Murray v. Murphy, 39 Miss. 214, 221 (1860); allegations which the court judicially knows to be untrue, Cole v. Maunder, 2 Rolle, Abr. 548 (1847); Bank v. Spilman, 3 Dana (Ky.) 150 (1835); Louisville, etc., Co. v. Palmes, 109 U. S. 244, 3 Sup. Ct. 193, 27 L. Ed. 922 (1883; equity); conclusions of law, 31 Cyc. 335, note 80; 6 Ency. Pl. & Pr. 336, note 4. See generally 31 Cyc. 333–337, and cases cited; 6 Ency. Pl. & Pr. 334–338, and cases cited; Stephen Pleading (Williston's Ed.) *155, 156.

action, and by others that it admits *a* cause of action merely. Mr. Roscoe in his work on evidence states the proposition broadly thus—"Suffering a judgment by default is an admission on the record of the cause of action." The true rule is that it admits the cause of action as alleged, in full, or to some extent, according to the nature of the action. As it admits all the material facts well pleaded, if a distinct, definite, entire cause of action is set forth, which entitles the plaintiff to a sum certain without further inquiry, it admits the cause of action in full as alleged. If by the rules of law further inquiry is to be had to ascertain the amount due, or the extent of the wrong done, and of the damage to be recovered, then it admits the cause of action, but not to the extent alleged, and subject to such inquiry. Thus, if it be debt on bond for a sum certain the whole is admitted, and no further inquiry is had, and so if assumpsit on a note or bill, and there are no indorsements entered on it, and the defendant does not move for an inquiry, the cause of action and the amount claimed are admitted. The note must be produced, but need not be proved. Greene v. Hearne, 3 T. R. 301; Roscoe, Ev. (10 Ed.) 71. But in actions of tort for unliquidated damages a different rule is necessarily applied. In such actions the plaintiff does not declare for a specific thing, but has an unlimited license in declaring, and may allege as much of wrong and injury, and demand as much damage as he will, and recover by proving any amount however small if sufficient to sustain an action. A defendant therefore in an action of tort is not holden to have admitted by his default the extent of the injury. It is assumed that, as the plaintiff may allege more than is true, he probably has done so, and the defendant by his default is considered as admitting the wrong to some extent, leaving that extent to be inquired into to enable the court to fix the damages, because such an inquiry is always and necessarily had in such cases. But he admits the wrong, and consequent right of the plaintiff to recover to some extent. By our practice this inquiry is not by writ of inquiry, or by reference, but made by the court on a hearing in damages. On that hearing it results from the very nature of the inquiry that any evidence tending to belittle or mitigate the injury complained of and admitted, and any evidence tending to aggravate it, is admissible. If, in proving the extent to which he was in fault, the defendant prove that he was not in fault at all, and that the injury occurred through the fault of the plaintiff, the plaintiff cannot complain.[4] The evidence does not deprive him of his right to judgment; it merely shows that, as he is not in fact entitled to any damages, he can only have such as the law gives him by reason of the admissions on the record. In the light of these elementary principles we may see how far the various dicta cited in the argument are true. One of them is that "a demurrer admits no

[4] Havens v. Hartford & New Haven Railroad Company, 28 Conn. 69 (1859) and cases therein cited. Accord.

facts as facts." That, as applicable to chancery practice, is true, for in chancery, when a demurrer is overruled, the respondent can answer over and show the averments to be untrue; but it is not true at law. It admits, or rather the party, by demurring only, admits, all or so much of the facts as facts as may be necessary to sustain a judgment. Again, it is said "a demurrer admits nothing as a rule of evidence." If anything more was intended by the author of that expression than that it does not admit facts alleged in the declaration, so that they could be used as evidence on the inquest, reference or hearing in damages,[5] it is an unintelligible and unfortunate expression. Of course on the inquest or hearing, where the object is to ascertain the extent to which the facts alleged are true, it would be absurd to offer the facts alleged in evidence, as fully admitted by the pleadings to be true, to prove themselves true. Such an inquiry would be senseless and unnecessary. Again, it is said that a demurrer admits the facts alleged for the sole purpose of testing their legal sufficiency. This too, is an attempt to use at law a rule in chancery. In chancery practice, as we have said, the facts are not admitted by being passed over, but are supposed to be true, for the purpose of testing their legal sufficiency at law. They are, each and all that are material, admitted to be true to some extent, as the basis of a final judgment. And so of the claim that "a demurrer admits a mere right to recover nominal damages." It admits no right. It admits, or the party by demurring admits, the facts as true to some extent. The law bases the right and the judgment on the facts as admitted.

Applying these principles to this case, we are satisfied the plaintiff is entitled to recover the sum of one thousand dollars. The defendant by his demurrer and his omission to deny the facts admitted the cause of action and every material element of it, and negligence was one of them. If the damages had been fixed by the statute at a single sum of $1,000 or $5,000, no hearing in damages would have been necessary or proper. No evidence which the defendant could properly offer, and no fact which the court could properly find, would affect the right of the plaintiff to recover that sum. And this is true whether the statute be regarded as giving a new right of action, or regulating the amount of damages and their disposition in an old one. The statute gives the court a discretion as to the amount of the damage above the sum of $1,000 and up to $5,000, and to that extent the court could properly inquire and were bound to inquire. It is of no importance that the court have found there was no negligence in fact. The existence of sufficient negligence to give a right of recovery on the

[5] That a demurrer does not admit facts well pleaded for use on the trial of other issues in the case or after withdrawal of the demurrer or after leave to plead over, see Havens v. Hartford & New Haven Railroad Company, 28 Conn. 69 (1859); Stinson v. Gardiner, 33 Me. (semble) 94 (1851); Bowen v. Grand Trunk Ry. Co., 86 Vt. 483, 86 Atl. 306 (1913); 6 Ency. Pl. & Pr. 338; 31 Cyc. 337, 338.

statute, if it gives a new action, was a material fact, a material element of the cause of action, and was conclusively admitted. And so of every other material element of a cause of action under the statute which was alleged, for all the allegations necessary to bring the plaintiff's case within the statute and give him the right of action provided by the statute were material, and were of course admitted by the omission to traverse them.

We advise judgment for the sum of $1,000.

In this opinion the other Judges concurred.

HALE v. HALL.

(Constitutional Court of South Carolina, 1809. 2 Brev. 316.)

Action in debt on a bail bond of one Haddon. To the declaration the defendant demurred specially, and assigned for causes: (1) That by the condition of the bond, as stated in the declaration, it does not appear that Haddon was to appear to answer on the day of the return of the writ, or any day in term; (2) that the expression of the sum in the obligatory part of the bond is vague, uncertain, and obscure. Judgment for defendant upon the demurrer. Plaintiff now moves to reverse the judgment.[6]

May 6th. The opinion of the court was declared by BREVARD, J., after stating the matter set forth in the declaration, and the averments. To this declaration there is a special demurrer for the insufficiency of the declaration; and the question was referred to the judgment of the District Court. The decision of that court was for the defendant, in support of the demurrer, and the plaintiff has appealed to this court. He has been fully heard by his counsel; and the arguments urged in his behalf have been duly considered. It is a clear rule of law that in all cases where pleadings are demurred to for matter of form, and for the causes specified in the Acts 4 and 5 Ann., a special demurrer is requisite, but not for matter of substance. A general demurrer in regard to matters of substance is always sufficient. In doubtful cases, however, it is recommended as best to assign the special causes of demurrer; because, on a special demurrer, advantage cannot only be taken of the matters of form specially set forth, but also of any matter of substance not expressly alleged; but on the general demurrer no matter of form can be taken advantage of.[7]

[6] The statement of the case is condensed.

[7] 6 Ency. Pl. & Pr. 308; 31 Cyc. 272; Stephen, Pleading (Williston's Ed.) *154; 1 Chitty, Pleading (Am. Ed. 1809) *639–*643. Accord.

"There were special demurrers at common law, but they were never necessary but in cases of duplicity, and therefore they were seldom practiced; for as the law was then taken to be upon a special demurrer, the party could take advantage of no other defect in the pleading, but to that which was specially assigned for cause of his demurring." Holt, C. J., in Anonymous, 3 Salk. 122 (1703).

1 Sellon, 335. It is also a rule that, if the declaration is founded on a bond, or other specialty, the defendant may demand oyer, and if it shows no cause of action he may demur; for the deed on oyer is part of the declaration. Com. Dig. 484. And where the plaintiff claims by a deed in the pleadings, he must make a profert of it to the court; and the deed itself must be shewn. Bull. 249. In this case the defendant has not demanded oyer of the bond, and condition. The condition must, therefore, be laid out of view, unless it can be considered as relevant matter, and properly brought into notice by the averments in the declaration. The question is as to the sufficiency of the declaration, both as to form and substance. An action of debt is founded on a contract, either express or implied, in which the certainty of the sum or duty appears; and the plaintiff is to recover the sum in numero, and not to be repaired in damages, as in actions which sound only in damages. Bull. 167; 2 Bac. Abr. 13, 20; 4 Co. 50. But when the damages can be reduced by averment to a certainty, the action of debt lies, as on a covenant to pay so much per load. 3 Lev. 429; 2 Salk. 658; 2 Raym. 815.

The plaintiff in this action demands $235, and declares on a specialty containing an obligation to pay $170, with interest, and costs of suit. The declaration is not excepted to, on the ground of a variance between the writ and declaration; because the plaintiff has gone on in his declaration to explain what was meant, and intended by the words "interest and costs," in the bond, and to aver that such and such facts existed, and that such was the intent of the parties in the contract, and that the sums meant by the words interest and costs, when added to the principal sum expressed in the bond, amount together to the exact sum demanded by the writ. It has been said that, although the general rule is that the action of debt must be for a sum certain, yet it will lie for a sum which is not certainly expressed, or not ascertained at the time of the contract, but which is capable of being ascertained, and made certain at the time of the action brought. Doug. 6; Bl. Rep. 1221; 1 H. Bl. Rep. 249. But this doctrine cannot be applied to actions of debt founded on specialty, but to simple contracts only. The specialty which will support an action of debt, must express a sum certain. The quantum of the debt should be clearly and certainly fixed by the instrument on which the debt is founded; or the instrument should itself furnish such data as would infallibly lead to a certain ascertainment of the debt. The rule by which the uncertainty apparent, on the face of the instrument, on which the debt is founded, is to be reduced to certainty, must be furnished by the instrument itself, and that rule must itself be certain; such a one as will lead to a certain result, and not be liable to vary according to extrinsic circumstances, or depend on parol evidence, dehors the specialty. The specialty in the present case does not furnish such a rule; and the uncertainty is not cured by the averments. It has been argued that

the facts set forth in the averments must be taken as true, because they are admitted by the demurrer; and if the facts be admitted, the amount of the debt is admitted, which corresponds with the writ. But this argument is founded on a petitio principii. The fact is assumed that the averments are well pleaded, and then the rule is applied that whatever is well pleaded must be considered as admitted. But it has not been shewn that the averments are well pleaded; and we are all of the opinion they are not so.

The declaration is faulty, and the judgment of the District Court must be affirmed. The plaintiff cannot recover less than he has demanded in this action, as he might do if the action had been founded on simple contract. He may, however, in some other form of action, recover the interests and costs in question, together with the specific sum mentioned in the obligation.

Motion overruled.

STATE ex rel. GARRISON v. COMMISSIONERS OF PUTNAM COUNTY.

(Supreme Court of Florida, 1887. 23 Fla. 632, 3 South. 164.)

[An alternative writ of mandamus was issued commanding the County Commissioners to cause Brown's Landing road to be repaired, or show cause why they should not do so.[8]]

The County Commissioners interposed a demurrer, which we will treat as being to the alternative writ, which is the declaration in a mandamus case. The grounds of this demurrer are as follows:

1st. * * *

4th. That in a case of the State v. Palatka & Indian River Railroad Company, this question has been already passed upon by this court (Putnam County Circuit Court), and an order made directing the removal of the obstruction by the sheriff of the county, and such order has been suspended by an appeal to the Supreme Court, and is now pending there. The Circuit Judge sustained the demurrer and dismissed the writ, and from this order of dismissal an appeal has been taken.

Mr. Justice RANEY delivered the opinion of the court.

I. The fourth ground of demurrer introduces matter of fact which does not appear upon the face of the alternative writ, and is, therefore, not within the province of a demurrer, and cannot be considered. Gould's Pleading, c. 2, § 43, c. 9, § 2.[9] * * *

The judgment of the Circuit Court is reversed.

[8] This statement is substituted for the reported statement of the contents of the alternative writ. Only a portion of the opinion is printed.

[9] For numerous cases accord, see note, 14 Ann. Cas. 348; 31 Cyc. 322, and cases cited; 6 Ency. Pl. & Pr. 297, 298, and cases cited; Stephen, Pleading (Williston's Ed.) *68, 69; 1 Chitty, Pleading (Am. Ed. 1809) *644. See Hale

MOORE, ADM'R, v. LESEUR AND WIFE.

(Supreme Court of Alabama, 1851. 18 Ala. 606.)

CHILTON, J.[10] This was an action of debt brought by the plaintiff in error to recover of the defendants upon a writing, in the following form: "$2535. By the 25th December next, I promise to pay the Thomas J. Moore, administrator of H. H. Moore, deceased, twenty-five hundred and thirty-five dollars, for value received of him. Feb. 10th, 1837. [Signed] Penelope N. Moore. [Seal.]"

The first count of the declaration describes this instrument as a writing obligatory—sealed, etc. The second count declares upon it as a promissory note. The common indebitatus counts are added. The defendants pleaded to all the counts, "that they did not owe the said sums of money demanded, or any part thereof, in manner and form," etc.; and to the 2d, 3d and 4th counts they pleaded the action did not accrue within six years next before the commencement of this suit, etc. The plaintiff took issue upon the first plea, and to the second replied that the defendants did, within six years next before the commencement of the suit, undertake and promise, etc. Rejoinder that the said Penelope N. Leseur did not, while sole and unmarried, promise within six years next before, etc. To this rejoinder the plaintiff demurred, and the court sustained the demurrer. * * *

1. It is insisted that the plea of nil debet to the first count, which is upon a sealed instrument, is bad, and that the demurrer to the rejoinder of the defendants to the plaintiff's replication to the second plea reaches back to the first plea, notwithstanding the plaintiff had taken issue upon that plea, raising no objection whatever to it. We do not so understand the law, as to the effect of this demurrer. A demurrer opens the pleadings and goes back to the first error,[11] but we have nowhere seen it held that it could be visited back in favor of the party demurring upon separate and totally distinct pleas, upon which he had taken issue, thereby waiving all objection to them, and expressly withdrawing them from the consideration of the court on demurrer.

v. Hall, supra, p. 526. "The matter of estoppel set up in the demurrer arises dehors the plea, and the demurrer setting up such facts is a mere speaking demurrer. It was an attempt to reach by demurrer that which should have been set up by replication to the plea." Haralson, J., in First National Bank v. Leland, 122 Ala. 289, 294, 25 South. 195, 196 (1899).

[10] Portions of the opinion are omitted.

[11] "I have no doubt that on demurrer the court will look through the whole proceedings, and wherever the first fault arises, there they will lay their finger, and give judgment against such of the parties as shall have committed it, * * * and the reason of this course of proceeding in the court is fundamentally right: for should they, in the first instance, rectify the last fault, they must then hear another motion to set the preceding one to rights also; by which mode half a dozen questions might be made on the propriety of proceedings, only one of which might be determined at any one court." Grimke, J., in Ordinary v. Bracey, 1 Brev. (S. C.) 191, 196 (1802). For numerous cases accord, see 31 Cyc. 338, 6 Ency. Pl. & Pr. 326.

We apprehend no such decision can be found. 1 Chitty's Pl. (edition of 1847) 668, 669, and note 1. * * *

It follows from the views we have expressed, that the court did not err in giving judgment upon the demurrer for the defendants below. It is therefore affirmed.[12]

AUBURN & OWASCO CANAL CO. v. LEITCH.

(Supreme Court of New York, 1847. 4 Denio, 65.)

Demurrer to a replication. The declaration was in assumpsit for the recovery of certain installments due upon shares of the capital stock of the plaintiff corporation, subscribed for by the defendant. Pleas: 1. Non assumpsit. 2. Nul tiel corporation. Replication to the second plea, setting out the act incorporating the plaintiff, together with certain acts amending and continuing that act. The defendant demurred to the replication, and the plaintiff joined in demurrer.

BRONSON, C. J. The defendant insists that the declaration is bad on general demurrer. (The chief justice then examined the pleadings, and came to the conclusion that the declaration was substantially defective, and then proceeded as follows:) But it is said that, as the defendant pleaded non assumpsit as well as nul tiel corporation, he cannot upon this demurrer go back, and attack the declaration; and several cases have been cited to sustain that position. But it will be found on examination that the point has never been directly and necessarily adjudged. The doctrine was first started in Wheeler v. Curtis, 11 Wend. 653, and was there supposed to result from the well-established rule that the defendant cannot both plead and demur to the same count. It was said that the defendant should not be allowed to do indirectly, what he would have no right to do directly. But the question whether the declaration was good or bad was not decided. The cause went off upon other grounds; and the point in question was not necessarily settled. In Dearborn v. Kent, 14 Wend. 183, the dictum in the first case was repeated; but it was expressly held that the declaration was sufficient; so that it was wholly unnecessary to inquire whether the defendant was at liberty to make the question or not. Russell v. Rogers, 15 Wend. 351, is the next case; and there it

[12] In Davies v. Penton, 6 B. & C. 216 (1827), to a declaration for breach of articles of agreement the defendant pleaded two pleas. The plaintiff demurred to one plea and for a replication to the other alleged a discharge in bankruptcy. Littledale, J., said: "Then it is said that the plaintiff has no right of action, because it appears upon the record that he had become bankrupt. * * * But supposing anything turned on the question of bankruptcy, we should be bound to decide on the plea and demurrer following one another. We must treat the count, plea and replication, and the count, plea, and demurrer, as distinct records, and give judgment upon each without reference to the other."

was not decided whether the declaration was good or bad. It was apparently good; so that the point in question did not necessarily arise. In Miller v. Maxwell, 16 Wend. 9, this doctrine was mentioned for the last time; and the same learned judge who first started it went a great way towards knocking it on the head. In that case the defendant pleaded the general issue, and two special pleas. The plaintiff demurred to the special pleas, and they were adjudged bad; but the defendant was allowed to go back and attack the declaration; and judgment was given against the plaintiff for the insufficiency of that pleading. Now, although the learned judge who delivered the opinion of the court took a distinction between a defect in the declaration which would not be cured by a verdict and one which could only be reached by a demurrer, the principle of that case is directly opposed to the dicta which had preceded it.

It is quite clear that the defendant cannot both plead and demur to the same count. And it is equally clear that at the common law he could not have two pleas to the same count. Indeed the two things, though stated in different words, are only parts of one common-law rule, to wit, that the defendant cannot make two answers to the same pleading. The statute of 4 and 5 Anne, c. 16, was made to remedy this inconvenience; and it allowed the defendant, with the leave of the court, to plead as many several matters as he should think necessary for his defence. With us leave of the court is no longer necessary. 2 Rev. St. (1st Ed.) pt. 3, c. 6, tit. 2, § 9. The statute does not say that the defendant may both plead and demur; and consequently he cannot make two such answers. But he may plead two or more pleas; some of which may terminate in issues of fact, to be tried by a jury; while others may result in issues of law, to be determined by the court. And whenever we come to a demurrer, whether it be to the plea, replication, rejoinder, or still further onward, the rule is to give judgment against the party who committed the first fault in pleading, if the fault be such as would make the pleading bad on general demurrer. This rule has always prevailed. It was the rule prior to the statute of Anne; and to say that the defendant, because he pleads two pleas, one of which results in a demurrer, cannot go back and attack the declaration, would be to deprive him of a portion of the privilege which the legislature intended to confer. He cannot plead and demur at the same time, because the common law forbids it; and the statute does not allow it. But he may plead two pleas; and he takes the right with all its legitimate consequences; one of which is that, whenever there comes a demurrer upon either of the two lines of pleading, he may run back upon that line to see which party committed the first fault; and against that party judgment will be rendered. Aside from the dicta in question, there is not a shadow of authority, either here or in England, for a different doctrine.

Although it seems that no case upon this point has found its way into the books, I well remember that since the decision in Miller v.

Maxwell, 16 Wend. 9, it has been several times announced from the bench that in a case like this the defendant was at liberty to go back and attack the declaration; and I think the point has been more than once directly decided. I know that the late Mr. Justice Cowen entertained and expressed that opinion, as I did myself; and it is also the opinion of my present associates. I would not lightly overrule so much as a mere dictum, if it was of the nature of a rule of property, and had stood long enough to become one. But this is not a question of that kind.

Judgment for the defendant.[13]

DUNLEVY v. FENTON.

(Supreme Court of Vermont, 1908. 80 Vt. 505, 68 Atl. 651, 130 Am. St. Rep. 1009.)

Assumpsit for breach of a marriage promise. Heard on special demurrer to plaintiff's replication to defendant's sixth special plea, at the September term, 1907, Windham county, Haselton, J., presiding. Demurrer overruled and replication adjudged sufficient. The defendant excepted. The opinion states the substance of the pleadings in question.

MUNSON, J.[14] The plea alleges, in substance, that the plaintiff by her deed in writing under her hand and seal released and discharged the defendant from the cause of action sued upon, and covenanted and agreed that at the next succeeding term the suit should be entered, "settled, and discontinued," and makes profert of said deed.

The replication alleges in substance that the plaintiff made said supposed deed of release, and delivered it to one Garceau, on condition and in consideration that the defendant then promised that he would make and deliver to the plaintiff a like deed of release discharging the plaintiff to the same extent, and would deliver to the plaintiff the pleas prepared in the case, and would leave $500 with Garceau for the plaintiff by a time stated, and that both parties should treat such agreement as strictly confidential; and alleges further that the parties

[13] The decisions in Illinois are contra on the ground that one cannot plead and demur at the same time. See note 26 L. R. A. (N. S.) 117; 10 Ill. Law Rev. 417.

In Illinois it is the rule that where a demurrer to a pleading has been overruled, and the party interposing the demurrer has pleaded over, if a demurrer is filed to a subsequent pleading, it does not open the record so as to attack the pleading to which a demurrer had been previously overruled. Fish v. Farwell, 160 Ill. 236, 43 N. E. 367 (1896); City of Chicago v. People, 210 Ill. 84, 92, 71 N. E. 816 (1904); 10 Ill. Law Rev. 424. But the weight of authority is otherwise. Cummins v. Gray, 4 Stew. & P. (Ala.) 397 (1833); Childress v. Foster, 3 Ark. 252 (1848); Johnson v. Pensacola, etc., Co., 16 Fla. 623, 26 Am. Rep. 731 (1878); Perrin v. Thurman, 4 T. B. Mon. (Ky.) 176 (1826); Wales v. Lyon, 2 Mich. 276, 281 (1851); Lafayette Bridge Co. v. City of Streator (C. C.) 105 Fed. 729, 732 (1900); Aurora v. West, 7 Wall. 82, 93, 19 L. Ed. 42 (1868).

[14] A portion of the opinion is omitted.

were to meet at Garceau's office at the time stated, and that Garceau was then to deliver said money to the plaintiff and said supposed deed of release to the defendant, but that said deed was not to be of any force until defendant had fully complied with every condition of said agreement; and alleges further that the terms of said agreement were made public by defendant, that said pleas were not delivered to the plaintiff, but were filed in court, and that neither the defendant's release nor said sum of money was delivered to the plaintiff, that plaintiff was at Garceau's office at the time named, and was then informed by Garceau that the defendant had not left said money as agreed, and that plaintiff waited some time without the defendant appearing, and then demanded of Garceau the return of her said supposed deed of release, but that Garceau refused to return it, and afterwards delivered it to defendant's attorneys against her protest, and that the supposed deed pleaded by defendant is not her deed of release, concluding with a verification.

The replication is demurred to, and special causes of demurrer are assigned, which are, in substance, that it does not answer the plea, either by a general form of denial or by a denial of any single material fact; that it advances new matter, and thereby sets forth a contract different from that stated in the plea, and so amounts to the general issue; and that it does not confess and avoid any material allegation of the plea.

The plaintiff claims that the plea is defective, in that it fails to allege a delivery of the deed of release, and that if it be held that a delivery of the deed is sufficiently alleged, the plea is double, in that it sets up a release of the cause of action and a covenant to discontinue the suit, and that, inasmuch as the plea is bad, it is sufficiently answered by the replication, even though that be defective. The demurrer reaches all the pleadings, but has the force of a general demurrer only, as applied to pleadings prior to the one demurred to.[15] So it reaches only substantial defects in the plea, and, if a delivery of the release is argumentatively alleged, the plea is sufficient, for argumentativeness and duplicity are but defect of form. We think a delivery of the deed of release is argumentatively alleged. The allegation is not that the plaintiff made a deed releasing the defendant, but that by her deed she released him, which implies a delivery. So the plea is sufficient, and, if the replication stands, it must be upon its merits. * * * We hold the replication insufficient on both the grounds considered.

Judgment reversed, demurrer overruled as to the plea and plea adjudged sufficient, demurrer sustained as to the replication, and that adjudged insufficient, and cause remanded.

[15] For numerous cases accord, see 6 Ency. Pl. & Pr. 333, note 1; 31 Cyc. 341, note 21.

LANGLEY v. METROPOLITAN LIFE INS. CO.

(Supreme Court of Rhode Island, 1887. 16 R. I. 21, 11 Atl. 174.)

PER CURIAM. The demurrer to the declaration must be overruled. The declaration contains a special count on a policy of life insurance, also a count on account settled or stated, and the common counts. The demurrer is a general demurrer to the entire declaration. Of course it is bad if either count is sufficient. The defendant does not claim to point out any defect in any but the first count, and we do not discover any defect in the other counts. Gould, Pl. c. 5, § 6; 1 Chit. Pl. *696. Demurrer overruled.[16]

SILVER v. RHODES.

(Superior Court of Delaware, 1837. 2 Har. 369.)

[Action on the statute for not entering satisfaction on a judgment. Demurrer to the declaration. The conclusion of the court upon the demurrer was as follows: "We, therefore, hold the declaration in this case to be sufficient, and overrule the demurrer. Judgment for plaintiff.] [17]

On this judgment the plaintiff executed a writ of inquiry in vacation, and recovered $10 damages; the costs of the inquisition being $23.

[16] For very numerous cases in accord, see 6 Ency. Pl. & Pr. 301, note 4; 31 Cyc. 329, note 61.

In like manner, where a plea purports to answer a declaration consisting of several counts and is insufficient as to any one of them, it is bad on demurrer. 16 Ency. Pl. & Pr. 577–579; 31 Cyc. 142, note 58. Cf. Fleming v. Mayor, 40 N. J. Law 270 (1878), page 439, supra, and notes thereto.

"With respect to the subject of a demurrer being too large, there is a very learned note of my brother Manning to the case of Hinde v. Gray, 1 Man. & G. 201 (1840), note (a), which, in my opinion is entitled to considerable weight. He states the modern practice as to overruling demurrers as being too large to have been imported from courts of equity. There had been formerly cases in the Court of Queen's Bench, and also in the Court of Common Pleas, where demurrers had been said to be overruled as being too large, which have been followed by subsequent decisions in this court. The question is, Is that practice right or not, or ought not the court on such demurrer to give judgment on the whole record, according to the truth? I think the observations in that note are entitled to considerable weight, and I am inclined to think the practice has been wrong, and that judgment on demurrer should be given on the whole record according to the truth. Take for instance, the case of a general demurrer to two counts, one of which is good and the other bad, the plaintiff ought to have judgment on the good count, and not on the other; in short, the court should look at the whole record, and see what is the proper judgment to give upon the whole. If that be not done, considerable difficulty may arise in the assessment of damages." Parke, B., in Briscoe v. Hill, 10 M. & W. 735, 740 (1842). See, also, Slade v. Hawley, 13 M. & W. 757 (1845); Cooke v. Thornton, 6 Rand (Va.) 8, 11, 15 (1827), hardly a semble. Accord.

[17] This short statement is substituted for the official report of the case upon the demurrer.

And at the next term Rogers, for defendant, obtained a rule to show cause why that inquisition should not be set aside.

On the hearing of this rule it was objected that the inquisition ought to have been taken at bar, and that the party had no right to take it in vacation, though it was admitted that the practice had been to take either course.

THE COURT said that the 19th section of the act for establishing courts had never been considered as taking away the common-law remedy by inquisition, but as affording an additional remedy by motion for an order in the nature of a writ of inquiry to assess the damages at bar. It is at the option of the party to take either remedy.

But the defendant's counsel also objected that the judgment did not authorize the inquisition, that being a judgment on a special demurrer; that it was not final.

PER CURIAM. The general rule is that a judgment rendered on a demurrer follows the nature of the pleading demurred to; the judgment on a demurrer to a plea in abatement, if for the defendant, is that the writ be quashed; if for the plaintiff, that the defendant answer over; and thus the form of the judgment corresponds to that of the prayer of judgment in the demurrer. Gould, Pl. § 41, c. 9.

When a demurrer is joined on any pleadings in chief, as on the declaration, plea in bar, or other pleading which goes to the action, the judgment is final; i. e., if for the plaintiff, quod recuperet; if for the defendant, quod eat sine die. Id. § 42.

In this case the demurrer is both general and special. It concludes with a prayer that, "for want of a sufficient declaration in this behalf, the said George Rhodes prays judgment, and that the said William Silver may be barred from having or maintaining his aforesaid action against him," etc.

On a demurrer to the declaration the judgment for plaintiff cannot be anything else than quod recuperet. Such demurrer must always go to the cause of action; for if it conclude with a prayer that the plaintiff's writ be quashed, instead of a prayer in bar, the plaintiff may treat it as a prayer for judgment in bar; and if it be found for him on joinder in demurrer, the judgment would be quod recuperet. Gould, Pl. 477, § 42.

The special demurrer is also a general demurrer.

Rule discharged.[18]

[18] "Upon a demurrer to a plea in law, or to any other pleading in chief, the judgment is final; final, I mean, not as contradistinguished from a judgment interlocutory, but final, as it is conclusive of the question at issue. And in this sense the judgment is equally final, whether it be for the plaintiff or for the defendant, or for or against the demurrant. Its conclusive effect cannot be avoided, except by opening or avoiding the judgment. * * * It is true that courts may and do permit pleadings to be amended after judgment upon demurrer. But this end is attained either by not permitting the rule for judgment to be entered, or, if entered, by vacating it, or by treating the pleading and the judgments upon it as a nullity, and in theory at least, if

SECTION 2.—MOTIONS TO STRIKE

WALPOLE v. COOPER.

(Supreme Court of Indiana, 1844. 7 Blackf. 100.)

SULLIVAN, J. Assumpsit by Cooper, assignee of Preston and Meek, against Walpole on a promissory note. Pleas: 1. Payment to assignors before the assignment. 2. Payment of 50 dollars part, etc., to the assignors, etc. 3. That the note was obtained from the defendant by the assignors by fraud, etc. 4. Payment to the assignors in manner following, viz., that, at the time of the assignment, they were indebted to the defendant in the sum of 175 dollars for professional services, etc. 5. That at the time of making said promissory note, the assignors agreed to receive from the defendant cash notes in satisfaction and discharge of the same, which he has always been ready to pay, etc. 6. Non assumpsit. The plaintiff, on affidavit filed stating that the pleas were false, vexatious, and intended for delay, moved to set them aside. The defendant objected, but the court set aside the pleas, and gave judgment for the plaintiff.

It is the duty of a court, when a false plea is filed which is evidently intended to hinder, perplex, and delay the case, to reject it on motion. This should be done to guard the administration of justice against mockery and abuse. In the performance of this duty, however, care should be taken that the courts do not usurp the rights of another tribunal, by deciding upon the truth or falsity of matters of fact.[19] There are cases reported in which the courts have set aside pleas apparently good upon their face, upon an affidavit that they were false and vexatious. The case of Richley v. Proone, 1 B. & C. 286, is of that kind. But those cases are discountenanced by later decisions, and the rule seems now to be that, if there be nothing improper on the face of the plea, and it be relevant, a motion to reject it on account of its falsity, or to sign judgment as for want of plea, will be overruled.[20] Merrington v. Becket, 2 B. & C. 81; Smith et al. v.

not in fact, striking it from the record." Green, C. J., in Hale v. Lawrence, 22 N. J. Law, 72, 80, 81 (1849). See, also, White v. Levy, 93 Ala. 484, 487, 9 South. 164 (1890); Pettys v. Marsh, 24 Fla. 44, 46, 3 South. 577 (1888); Weiss v. Binnian, 178 Ill. 241, 245, 52 N. E. 969 (1899); Bagley v. Johnston, 4 Rich. (S. C.) 22, 23 (1850).

Error in sustaining a demurrer is waived by amending. 6 Ency. Pl. & Pr. 359. Error in overruling a demurrer is usually waived by pleading over. 6 Ency. Pl. & Pr. 364.

[19] Striking or disregarding a sham plea does not constitute a denial of trial by jury as guaranteed by the state constitutions. White v. Calhoun, 83 Ohio St. 401, 94 N. E. 743 (1911); Coykendall v. Robinson, 39 N. J. Law, 98 (1876.)

[20] But if the plea appears by the record or on its face to be false, it may be stricken or judgment may be signed as for want of a plea. Blewitt v. Mars-

Backwell, 4 Bing. 512; 1 Blackf. 347, note (1). An application to reject a plea, founded on an affidavit that it is false, must, in general, be met by an affidavit of the defendant that the plea is true. The effect, therefore, of listening to such applications is to require pleas to be verified by affidavit, which, according to the statute, may be pleaded without oath.

Some of the pleas in this case are clearly defective, others are well pleaded. As the case must be reversed, we will leave the plaintiff to his demurrer to the defective pleas, and allow him to take issue on those well pleaded.

PER CURIAM. The judgment is reversed with costs. Cause remanded, etc.[21]

SHOTWELL'S EX'RS v. DENNIS.

(Supreme Court of New Jersey, 1834. 14 N. J. Law, 501.)

HORNBLOWER, C. J.[22] This is an action of debt on a bond. The defendants have pleaded, first, non est factum, and, secondly, that the bond was given upon a corrupt and usurious contract. The plaintiff moves to strike out the second plea, not because usury is not a legal bar, but because the defence set up is not well pleaded. It is objected that the plea does not allege or specify any of the particulars of the contract, nor the sum to be forborne, nor the sum to be paid for such forbearance, and that the plea is, in other respects, uncertain, etc.

These may be very sufficient and fatal objections to the plea, on a demurrer; but the counsel for the plaintiffs have referred us to no case in which the court has gone so far as to settle the legal accuracy of a special plea in bar, upon a mere motion to strike out the plea. Where it is plainly frivolous and trifling, or where the subject-matter of the plea, although accurately and technically set forth, according to the soundest rules of special pleading, is no answer to the declaration, or excluded by a positive rule of law, it may, no doubt, be stricken out. Anonymous, 7 N. J. Law, 160; Stadholme, Ex'r, v. Hodgson, 2 T. R. 390. In the case of Westervelt v. Merenus, 3 N. J. Law, 693, the defendant, after pleading title, and giving bond in the court for the trial of small causes, put in, to an action brought in this court for the same trespass, the plea of not guilty; and it was stricken out. In

den, 10 East 237 (1808); Vere v. Carden, 5 Bing. 413 (1829); Henderson v. Reed, 1 Blackf. (Ind.) 347, and note (1825); 20 Ency. Pl. & Pr. 4; 31 Cyc. 624. "If a plea contain very improbable matter, and the frame of it is subtle and intricate, so as to lead to the inference that it is pleaded for a dilatory purpose, the court will on motion, supported by affidavit of its falsehood, allow judgment to be signed as for want of plea, and make the defendant or his attorney pay the costs." Stephen, Pleading (Williston's Ed.) *489. See to the same effect 20 Ency. Pl. & Pr. 4, and cases cited.

[21] For cases in accord, in addition to those cited in the opinion, see 20 Ency. Pl. & Pr. 5.

[22] The statement of facts is omitted.

Coryell v. Croxall, 5 N. J. Law, 764, the plea of payment to the payee of the note, before notice of the endorsement to the plaintiff, was struck out, because the note was payable without defalcation or discount. So in The Inhabitants of the Township of North Brunswick v. Booraem et al., 10 N. J. Law, 257, the defendant pleaded that the action was not prosecuted by the plaintiffs on record, but by a third person. The plea was struck out, because the facts set forth were not the subject-matter of a plea. But in the case before us the defendant sets up usury, which, if well pleaded and true, is not only a lawful plea, but a good defence to the action. Whether it be a formal and good plea of usury is not necessary to be considered now. The plaintiffs are at liberty to demur to it; and then the defendants may apply, if they think proper, for leave to amend. Thelluson v. Smith, 5 T. R. 152. If a plea in bar is not adapted to the nature of the action, or conformable to the count, as if nil debet be pleaded to an action of assumpsit, as was done in Stafford v. Little, Barnes' Notes, 257, the plaintiff may treat it as a nullity, and sign judgment, or move to set it aside. But if the defence is a good one, though badly pleaded, the plaintiff must demur.

FORD, J., concurred.

RYERSON, J., expressed no opinion, having been of counsel with one of the parties before his appointment.

Motion denied.[23]

SECTION 3.—OBJECTION TO EVIDENCE

ADAMS v. WAY.

(Supreme Court of Errors of Connecticut, 1864. 32 Conn. 160.)

Covenant on a guaranty. Tried in the superior court on the general issue.[24]

DUTTON, J. On the trial of this case to the court, the plaintiff in the first place offered in evidence the original guaranty executed by the defendant, and which is set out in full in the declaration. To this the defendant objected, on the ground that there was a fatal variance between it and the declaration. The particular ground of variance is not pointed out, but on the hearing before us it was claimed to be that the debt specified in the instrument was payable in three years, while the debt alleged to be secured by the mortgage was payable in three years or whenever there should be a failure to pay the interest semi-

[23] For numerous cases in accord as to the right to strike or disregard frivolous pleadings and as to what constitutes frivolousness, see 20 Ency. Pl. & Pr. 18–21; 31 Cyc. 609–612.

[24] The statement of the case and portions of the opinion are omitted.

annually. The court below excluded the evidence. We think this decision was erroneous.

The regular course of pleading requires that the plaintiff should in his declaration state his case; that is, he should allege the facts on which he claims a legal right to recover. The defendant may then demur, that is, deny the legal sufficiency of these facts, or deny the facts themselves, or confess and avoid them. These are distinct grounds of defense, and ought not to be mingled or confounded. If he denies the facts alleged in the declaration, he waives for the time being the question of their sufficiency in law. He cannot on the trial of this issue take the ground that the facts if true constitute no ground of action. If he wishes to take that ground he should demur, or reserve to himself the right to do it by motion in arrest or writ of error. The simple question to be tried on the general issue is whether the material facts alleged in the declaration are true. By "material" in this connection is not meant of legal sufficiency, but whether they constitute a part of the plaintiff's case, as he presents it. Whether that case will sustain in law an action or not cannot be considered on a trial to the jury. If a plaintiff, either through his own folly, or the ignorance of his counsel, should sue a defendant in slander for calling him a rascal, and if the defendant, unwilling to admit that he has been guilty even of an insult, should deny the speaking of the words, the court would be bound to take a verdict of the jury on that question, and could not exclude the evidence as constituting no ground of action. If the jury should find for the plaintiff, the defendant could then render the verdict ineffectual by a motion in arrest or a writ of error. Any other course would mar the logical symmetry of common-law pleadings. If it should be asked, Can a plaintiff prove any fact that he sees fit to allege? we answer, clearly not. The facts which he has a right to prove must be pertinent to his case. Matters that are impertinent or mere surplusage he will have no right to prove although alleged. If the plaintiff should aver that he was a native of a particular place, or fifty years old, or a white man, or that the defendant was a foreigner, or a colored man, or a burglar, he would have no right to prove these allegations, because they could not under any supposable circumstances add anything to any case which he might present. If such averments are scandalous, the court would on motion order them to be stricken from the declaration. If they are merely impertinent and immaterial, the court would on objection made or of its own accord refuse to hear the evidence to prove them, as tending to mislead the jury, and taking up the time of the court for no valuable purpose. In the present case there was no variance between the evidence and the allegations in the declaration. It corresponded exactly with that part of it to support which it was offered. The real objection, if there was any, was not to the proof, but to the plaintiff's case as proved. The defendant claims that the evidence shows that the plaintiff took a mortgage, different from that which he guaranteed,

and that therefore he, especially as he was a surety, was not bound by the guaranty. If that was so, it is apparent on the face of the declaration, and the objection should have been taken, not to the evidence, but either by demurrer, or, as the case was tried to the court, by objecting to a judgment in favor of the plaintiff on the facts alleged and proved.

The rule that the plaintiff may on the general issue prove all the material allegations contained in the declaration, and that if these are insufficient in law to sustain the case the objection must be taken by demurrer or some similar mode, and not by objection to the evidence, is fully sustained by the authorities.[25] 1 Swift Dig. 737; 1 Greenl. Ev. § 51. In Canterbury v. Bennett, 22 Conn. 623, the defendant, on a trial upon the general issue, asked the superior court to charge the jury that, if all the facts set forth in the declaration should be found by them to be true, they constituted in law no reason why the plaintiff should recover, and that their verdict must be for the defendant. But the court refused so to charge, and this court refused to grant a new trial, upon the ground that the proper mode of taking advantage of such a defect in the declaration is by a demurrer, a motion in arrest or a writ of error. If the court could not direct the jury to disregard the evidence on the ground that it would not constitute a cause of action, it is clear that it could not exclude the evidence for the same cause.

No case has been cited which when carefully scrutinized would lead to a different result. * * *

Although the plaintiff is entitled to a new trial for the rejection of the testimony, he does not claim it if the court are satisfied from what appears in the case that it would be of no avail to him. We are not satisfied that this would be the result. We are not clear that, if the objection made by the defendant could have been properly taken, it would have prevailed. There are several expressions in the instrument given by the defendant, from which it may perhaps be inferred that it was drawn up with reference to the mortgage in question, as a document already prepared and agreed to by the defendant. * * *

We therefore advise a new trial.

In this opinion the other Judges concurred, except PARK, J., who dissented.

[25] Swift & Co. v. Rutkowski, 182 Ill. 18, 54 N. E. 1038 (1899); Rothschild v. Brusecke, 131 Ill. 265, 23 N. E. 419 (1890); Corey v. Bath, 35 N. H. 530, 542 (1857), semble; Potts v. Clarke, 20 N. J. Law, 536, 540 (1845), semble; Cunningham v. Herndon, 2 Call (Va.) 530 (1801); Reynolds v. Hurst, 18 W. Va. 648, 653 (1881), semble. Accord. Stoflet v. Marker, 34 Mich. 313 (1876); Steele v. Western Inland Lock Nav. Co., 2 Johns. (N. Y.) 283 (1807), semble; Kenyon v. Cameron, 17 R. I. 122, 20 Atl. 233 (1890). Contra.

SECTION 4.—NONSUIT

SADLER v. ROBINS.

(Court of King's Bench, 1808. 1 Campb. 253.)

Assumpsit on a decree of the high Court of Chancery in the island of Jamaica. The declaration stated that on the 16th day of July, 1805, in a certain cause, wherein James Sadler and others were complainants, and James Robins and others, executors of John Sadler, deceased, were defendants, it was by the said high Court of Chancery ordered, adjudged and decreed that the said James Robins and one R. Haywood, since deceased, should, on or before the first day of January then next ensuing, pay unto the said James Sadler, or his lawful attorney or attorneys in the said island, the sum of £3,670. 1s. 9¼d. current money of the said island, with interest thereon from the 31st day of December then last past, first deducting thereout the full costs of the said defendants expended in the said suit, the same to be taxed by George Howell, Esq., one of the masters of the said court, and also deducting thereout all and every further payment or payments which the said James Sadler and R. Haywood, or either of them might, on or before the said 1st day of January, 1806, shew to the satisfaction of the said George Howell that they or either of them had paid on account of their said testator's estate. The declaration having then stated a liability and promise in the words of the decree, and the amount of the sum to be paid in sterling money with interest, went on to aver that the said James Robins and R. Haywood did not, nor did either of them, on or before the 1st day of January, 1806, or at any subsequent time, cause the costs by the said defendants in the said cause in the said Court of Chancery expended in that suit to be taxed by the said George Howell, Esq., or by any other of the masters of the said court of Chancery, but as well the said James Robins and R. Haywood, in the lifetime of the said R. Haywood, as the said James Robins since the death of the said R. Haywood, have altogether neglected and refused so to do, nor did the said James Robins, and R. Haywood, in the lifetime of the said R. Haywood, on or before the said 1st day of January, 1806, shew to the satisfaction of the said George Howell, or any other master of the said court, that they or either of them had paid on account of the said testator's estate any sum or sums of money whatsoever. Breach, for nonpayment of the said sum of £3,670. 1s. 9¼d. current money, with interest due thereon, as mentioned in the decree. Plea, the general issue.

The Attorney General having opened the plaintiff's case,

Lord ELLENBOROUGH [26] expressed himself of opinion that the action

[26] Portions of the report of the case are omitted.

was not maintainable, as it did not appear what sum was actually due to the plaintiff according to the terms of the decree. * * *

The Attorney General then urged strenuously that the objection was upon the record, and that if it was well founded, judgment might be arrested.

Lord ELLENBOROUGH. If there is evidently no consideration to raise a promise, so that the action cannot be supported, why should the defendant be put to move in arrest of judgment? The plaintiff ought not to have brought his action here, while the decree was in an incomplete state. The case we had at the sittings after last term shews with what facility these decrees and judgments in the West India islands are obtained; and they ought to be examined with some strictness before they are put in force in this country. In many other cases, when it is clear the action will not lie, although the objection appears on the record, and might be taken advantage of by motion in arrest of judgment, or by writ of error, judges are in the habit of directing a nonsuit.

The plaintiff was then called.

The Attorney General, in the following term, obtained a rule to shew cause why this nonsuit should not be set aside; but cause being shewn, the judges were unanimously of opinion that it ought to stand.[27]

SECTION 5.—ARREST OF JUDGMENT

BEDELL v. STEVENS.

(Superior Court of Judicature of New Hampshire, 1853. 28 N. H. 118.)

Case, on a warranty. The declaration was as follows: "In a plea of the case, for that the said Abraham Bedell, Jr., heretofore, to wit, on the first day of August, A. D. 1851, at said Lancaster, by request of the said Calvin P. Stevens, purchased of him a note, signed by Alfred Carlton, and made payable to one A. V. Stevens, or bearer, in the sum of fifty-five dollars and fifty-nine cents, on demand, with use, and that the said Calvin P. Stevens affirmed the said Carlton was a person in good credit, when, in fact, he was poor, and the note of no value. And so the said Abraham Bedell, Jr., says that he, the said

[27] Van Vechten v. Graves, 4 Johns. (N. Y.) 403 (1809), contra. "Formerly in England, when a plaintiff voluntarily abandoned his suit, a nonsuit was granted, but this could not be done against his consent. 9 Enc. Law of Eng. 180. At a later time it seems that a nonsuit could be properly granted at nisi prius when it was clear in point of law that the action was not maintainable, and this, too, although the objection appeared on the face of the record and might have been taken advantage of by motion in arrest of judgment. Tidd's Pr. (3d Am. Ed.) *867, citing [Sadler v. Robbins] 1 Campb. 256 [1808]; [Ward v. Mason]. 9 Price, 294–296 [1821]." Cobb, J., in Kelly v. Strouse, 116 Ga. 872, 881, 43 S. E. 280 (1902).

Calvin P. Stevens, has deceived and defrauded him to the damage of the said Abraham Bedell, Jr., as he says, the sum of one hundred dollars."

On the trial the court instructed the jury that the plaintiff must prove that the defendant's representations in respect to the signer of the note in question were fraudulent.

A verdict was returned for the plaintiff, and the defendant moved in arrest of judgment, because of the insufficiency of the declaration.

The plaintiff opposed the motion, but asked, in case the declaration should be held insufficient, that an amendment may be granted without setting aside the verdict.

The questions arising upon the case were transferred to this court for determination.

EASTMAN, J.[28] A verdict having been returned for the plaintiff in this case, and it being quite apparent from the finding of the jury, under the instructions of the court upon the trial, that the plaintiff has a cause of action against the defendant, we have endeavored to find some good reason by which we could arrive at the conclusion that the motion for the arrest of judgment should not be granted.[29] But this we have been unable to do.

Judgments are arrested only for intrinsic causes, such as are apparent upon the record.[30] Formal defects and errors are cured by statute, and are harmless except upon special demurrer. Substantial defects also, such as would be bad on general demurrer,[31] are not unfrequently cured by verdict. If the plaintiff obtains a verdict, and it is found that his declaration is faulty in omitting some particular fact or

[28] A portion of the opinion is omitted.

[29] "Such motions are not favored. In considering them, courts liberally construe the pleadings, giving the plaintiff the benefit of every implication that can be drawn therefrom in his favor. Sentences and paragraphs may be transposed. The allegations in one part of the complaint may be aided by those in another, and if, taken together, they show the existence of facts constituting a good cause of action, defectively set forth or improperly arranged, the motion in arrest will be denied." Lamar, J., in Baker v. Warner, 231 U. S. 588, 592, 34 Sup. Ct. 175, 177, 58 L. Ed. 384 (1913).

[30] For numerous cases accord, see 5 Ency. L. & P. 503; 2 Ency. Pl. & Pr. 794; 23 Cyc. 824, 825. But see Hamilton v. Pease, 38 Conn. 115 (1871).

[31] "After the court has deliberately expressed its judgment upon demurrer, the same matter is never allowed to be urged in arrest of judgment." Scott, J., in Freeman v. Camden, 7 Mo. 298, 299 (1842), quoted with approval in Warren v. Badger, 255 Mo. 138, 146, 164 S. W. 206 (1914); Rouse v. County of Peoria, 7 Ill. (2 Gilman) 99 (1845); Reaveley v. Harris, 239 Ill. 526, 88 N. E. 238 (1909); Davis v. Carroll, 71 Md. 568, 18 Atl. 965 (1889: by statute); Ross v. Bank of Burlington, 1 Aikens (Vt.) 43, 15 Am. Dec. 664 (1825); White's Adm'x v. Central, etc., Co., 87 Vt. 330, 89 Atl. 618 (1914), semble; Edwards v. Blunt, 1 Str. 425 (1721); Cresswell v. Packham, 6 Taunt. 630 (1816). Accord. "It is said that the court, by ruling wrongly on a demurrer, does not preclude itself from afterwards ruling rightly upon a motion in arrest of judgment." McAlister, J., in Turnpike Co. v. Yates, 108 Tenn. 428, 430, 67 S. W. 69 (1902); Griffin v. Justices, 17 Ga. 96 (1855), semble; Field v. Slaughter, 1 Bibb (Ky.) 160 (1808); Newman v. Perrill, 73 Ind. 153 (1880: Code); Frum v. Keeney, 109 Iowa, 393, 80 N. W. 507 (1899: by statute). Accord.

circumstance without which he ought not to have judgment, but which is, nevertheless, implied in or inferable from the finding of those facts which are expressly alleged and found, the declaration is aided (because the omission is supplied) by the verdict. The court, in such case, must presume that the fact or circumstance omitted was proved to the jury. 1 Saund. 228, a. n. 1; Cro. Jac. 44; Carth. 304. See, also, Sewall's Falls Bridge v. Fisk & Norcross, 23 N. H. 171, where many American authorities are collected.

The rule, as laid down by Judge Gould, and which is sustained by numerous authorities, is this: When the statement of the plaintiff's cause of action, and that only, is defective or inaccurate, the defect is cured by a general verdict in his favor, because to entitle him to recover, all circumstances necessary, in form or substance, to complete the title so imperfectly stated, must be proved at the trial; and it is, therefore, a fair presumption that they were proved. But where no cause of action is stated, the omission is not cured by verdict. For as no right of action was necessary to be proved, or could have been legally proved under such a declaration, there can be no ground for presuming that it was proved at the trial. Gould's Pl. 497; Doug. 683; 1 Salk. 365; 3 Black. Com. 395; Bac. Abr. Verdict, X.

In Walpole v. Marlow, 2 N. H. 385, Richardson, C. J., states the rule thus: If the title stated in the declaration be defective, the judgment must be arrested. But if the title be defectively stated, the defect is cured by verdict. The true distinction between the two is this: When any particular fact is essential to the validity of the plaintiff's title, if such fact is neither expressly stated in the declaration, nor necessarily implied from the facts which are stated, the title must be considered as defective, and judgment must be arrested; but if such fact, although not expressly stated, be necessarily implied from what is stated, the title must be considered as only defectively stated, and the defect is cured by verdict.

As the court must judge, in motions of this kind, from the record, and that only, and not from what took place at the trial, it will presume, after verdict, that everything was proved which the averments stated in the declaration will warrant. But they can presume nothing more. They cannot presume that a cause of action is proved where none is stated; and where a material fact is omitted, which cannot be implied in or inferred from the finding of those which are stated, the verdict will not cover the defect. Bac. Abr. Verdict, X; Com. Dig. Pl. c. 87; 1 Salk. 364; 7 Term, 351, n. 1.

To apply these principles to the case under consideration: The plaintiff alleges that his declaration is case upon a warranty. But in what part of it do we find the warranty? In none, surely, unless we construe the word "affirmed" to be the same as "warranted." But this cannot be done. There is a marked difference between an affirmation and a warranty. An affirmation is a matter strongly stated; a warranty is a promise or contract, a security or guaranty. To affirm

is to state a thing positively; to warrant is to insure, indemnify, to guaranty. It is true that there is no particular form of words necessary to constitute a warranty, and that if the vendor, in a sale of chattels, makes any assertion or affirmation respecting the kind, quality or condition of the article upon which he intends the vendee should rely as a fact, and upon which he does rely, that is a warranty. Morrill v. Wallace & a. 9 N. H. 111. But what a jury may be at liberty to find to be a warranty is not an averment of a warranty. And we apprehend that the difficulty into which counsel has fallen, in drawing this declaration, arose from its having been done in haste, and from not considering, at the moment, the proper distinction to be made between what may be evidence of a warranty and the averment itself. The averment should be distinct, while in proving it no particular form of words is necessary to be shown. But it is clear that an affirmation merely is not a warranty, and there is no averment of warranty in the declaration.

The statements in the declaration might have been submitted to a jury, from which, perhaps, they would have found that the defendant made an affirmation in regard to the solvency of Carlton, which he intended the plaintiff should rely upon as a fact, and which he did rely upon; and thus much having been proved, the jury would have found a warranty, had the declaration contained the necessary averment.

But, as the matter now stands, the most that we can infer from the verdict is that the jury found that the defendant affirmed Carlton to be a person of good credit, which was, in fact, untrue. And it has been repeatedly decided that a false affirmation, in regard to the credit of a person, is no cause of action; that it must be fraudulent as well as false. Lord v. Colby, 6 N. H. 99, 25 Am. Dec. 445; Haycraft v. Creasy, 2 East, 92; Hamar v. Alexander, 5 B. & P. 241; Gallager v. Brunel, 6 Cow. (N. Y.) 346; Barney v. Dewey, 13 Johns. (N. Y.) 224, 7 Am. Dec. 372; Pasley v. Freeman, 3 D. & E. 51; Bean v. Bean, 12 Mass. 20.

It is evident, then, that this declaration must be bad. The validity of the plaintiff's title depended upon the warranty, and that is not stated; neither can it be implied from the facts which are stated. Because the defendant affirmed that Carlton was a person in good credit, and that was not true, we cannot infer that the jury found that he warranted Carlton to be a person in good credit. The plaintiff has undoubtedly taken the only ground, in regard to his declaration, that he could stand upon. It is clearly bad in assumpsit, for there is no allegation of any promise or undertaking, nor any consideration, stated with distinctness. It is bad in case for deceit, for there is no averment of a scienter.

By amendment the declaration could very easily be made good, either in assumpsit or case. An averment of a consideration and promise would make it good in assumpsit; and an allegation of a scienter would make it equally good in case. But, as it stands, it is neither the

one thing nor the other. It is, in fact, a defective declaration in case for a false affirmation. It lacks the allegation of fraud. So the court below viewed it upon the trial, as we infer from their instructions to the jury, and it is clearly bad until amended. * * *

Holding the declaration to be insufficient, the judgment must be arrested. But the plaintiff may have leave to move the common pleas to amend the declaration; upon what terms that court will decide should they grant the motion.

Judgment arrested.[32]

CITY OF ELGIN v. THOMPSON.

(Appellate Court of Illinois, 1901. 98 Ill. App. 358.)

DIBELL, P. J.[33] Ethel Magnus, between fourteen and fifteen years of age, was driving her father's horse and buggy in the city of Elgin, on Sunday afternoon, July 1, 1900, and had with her Kate Thompson, nineteen years of age. A steam roller stood on the west side of South Liberty street just south of Chicago street. As they approached it the horse took fright at the roller, turned around quickly, tipped over the buggy and ran. Miss Thompson was injured and brought this suit against the city of Elgin to recover damages therefor. The declaration contained two counts. Defendant pleaded not guilty, and there was a jury trial. At the close of plaintiff's evidence defendant moved to exclude the testimony and presented an instruction to find defendant not guilty. The court denied the motion and refused the instructions, and defendant excepted. The same course was pursued at the close of all the evidence. The jury awarded plaintiff $175. Motions for a new trial and in arrest of judgment were made by defendant and denied, and plaintiff had judgment on the verdict. Defendant appeals. * * *

The allegations of the declaration were meager. While the first count said the city negligently permitted the roller to remain in South Liberty street near the beaten driveway several days, "to the annoyance, discomfort and danger of the public driving along and upon said street," and that when the horse drawing plaintiff approached the roller he became frightened and unmanageable and ran away, etc., it did not in express terms say the roller was calculated to frighten horses or did frighten the horse drawing plaintiff, nor that the city should have known or did know it was calculated to frighten horses in time so it could have removed it before said injury. The second charged the roller was "of large dimensions and unusual appearance," and that it frightened the horse drawing plaintiff, etc., but did not directly charge that the roller was calculated to frighten horses, nor

[32] For cases accord, see 5 Ency. L. & P. 516, note 10; 2 Ency. Pl. & Pr. 799, note 2; 23 Cyc. 827, note 22.

[33] A portion of the opinion is omitted.

that the city had notice. The declaration was not questioned by demurrer. After verdict the rule is, where there is a defect or omission in a pleading, in form or substance, which would have been fatal on demurrer, yet if the issue joined is such as necessarily requires proof of the facts defectively stated, or omitted, without which it cannot be presumed that the judge would direct or the jury would give a verdict, such defect, imperfection or omission is cured by the verdict. Twin City Gas Works v. People, 156 Ill. 387, 40 N. E. 950; Cribben v. Callaghan, 156 Ill. 549, 41 N. E. 178. In B. & O. S. W. Ry. Co. v. Then, 159 Ill. 535, 42 N. E. 971, the necessary averment that deceased was in the exercise of due care was not contained in the declaration. It was held that after the verdict the declaration was good. In City of East Dubuque v. Burhyte, 173 Ill. 553, 50 N. E. 1077, it was said that if certain counts were defective in not averring notice to the city they were good after verdict. In Gerke v. Fancher, 158 Ill. 375, 41 N. E. 982, it was held that if the necessary matter is averred argumentatively, or may be inferred from the language used in the declaration, it will be good after verdict. In the present case we conclude the declaration sufficient after verdict.

Finding no reversible error in the record as presented to us for decision, the judgment is affirmed.[34]

POSNETT v. MARBLE.

(Supreme Court of Vermont, 1889. 62 Vt. 481, 20 Atl. 813, 11 L. R. A. 162, 22 Am. St. Rep. 126.)

This was an action for slander. Plea, the general issue with notice of special matter in justification. Trial by jury at the September term, 1888, Washington county, Tyler J., presiding. Verdict and judgment for the plaintiff. Exceptions by the defendant.

The defendant also moved in arrest of judgment for the insufficiency of the declaration. This consisted of five counts which alleged the

[34] For numerous cases applying the same rule see 22 Ency. Pl. & Pr. 939–944; 31 Cyc. 764, note 13. See, also, 1 Wms. Saunders, 227, note 1.

"The rule is, as laid down by Lord Mansfield, that where the plaintiff has stated his title or ground of action defectively or inaccurately, it is a fair presumption, after verdict, that it was proved at the trial; but where the plaintiff totally omit to state his title or cause of action, it need not be proved at the trial, and therefore there is no room for presumption. The rule is familiar; the only difficulty is in the application of it." Wilde, J., in Read v. Chelmsford, 16 Pick. (Mass.) 128, 130 (1834).

"When there has been a trial on an issue joined before a magistrate, his decision in favor of the plaintiff must be considered as evidence equivalent to the verdict of a jury, that the plaintiff was entitled to recover upon the testimony introduced. And in such cases the defect or omission in the declaration is cured as well by the judgment of the magistrate as by the verdict of a jury." Shepley, J., in Emerson v. Lakin, 23 Me. 384, 386 (1844).

speaking of different words, to different persons, at different times and places.[35]

MUNSON, J. * * * The several counts purport to be for words spoken upon different occasions. A general verdict was rendered upon all the counts. The second, third, and fifth counts are held to be insufficient, and the court has no means of determining upon which counts the damages were in fact assessed.

This being the situation, what disposition shall be made of the case? The courts are not agreed as to the procedure. One course is to end the suit by arresting the judgment.[36] Another course is to award a venire de novo. In Haselton v. Weare, 8 Vt. 480, the court arrested the judgment, saying that this was in accordance with the settled rule in England. The court had before it English cases in which this course had been taken, but the English practice up to that time was far from uniform, and the other method has since prevailed. One of the cases relied upon by the court in Haselton v. Weare was Holt v. Scholefield, 6 Term R. 691. But this case was expressly overruled by Leach v. Thomas, 2 Mees. & W. 427, soon after Haselton v. Weare was decided. In Leach v. Thomas, it was said that this point did not appear to have been at all argued in Holt v. Scholefield; and, in Corner v. Shew, 4 Mees. & W. 162, Parke, B., in stating that the point had been considered doubtful before the decision of Leach v. Thomas, expressed surprise that such a doubt should have existed, inasmuch as the matter had been provided for by rules of court, in both the king's bench and the common pleas, as early as 1654. In Empson v. Griffin, 11 Adol. & E. 186, the court of queen's bench followed the decision in Leach v. Thomas, and awarded a venire de novo.

The rule adopted in Haselton v. Weare has never been cordially approved. In Wood v. Scott, 13 Vt. 42, the court considered the question settled, but Redfield, J., referred, with evident sympathy, to the regret expressed by Lord Mansfield in Peake v. Oldham, Cowp. 275, that such a rule had been established. In Camp v. Barker, 21 Vt. 469, and Whitcomb v. Wolcott, Id. 368, the court vigorously criticised the rule, and indicated its intention to make all reasonable intendments in favor of a verdict when some of the counts were good. In the latter case, the court referred to the modern English practice of awarding a

[35] The statement of the case is abbreviated. The portion of the opinion overruling all the exceptions, and holding the second, third, and fifth counts insufficient, is omitted.

[36] In addition to the cases cited in the opinion, see Bank v. Hopkins, 1 T. B. Mon. (Ky.) 245, 15 Am. Dec. 113 (1824), semble; Clough v. Tenney, 5 Me. (5 Greenl.) 446 (1828); Kingsley v. Bill, 9 Mass. 198 (1812); Peabody v. Kingsley, 40 N. H. 418 (1860), semble; Maxfield v. Johnson, 2 Ohio, 204 (1825), semble. Accord. Hoag v. Hatch, 23 Conn. 585 (1855); Nelson v. Emerson, 1 Brev. (S. C.) 48, 2 Am. Dec. 646 (1802). Contra. See, also, 5 Ency. L. & P. 526, note 14, for collection of cases under statutes forbidding arrest of judgment under such circumstances.

If the several counts are for the same cause of action, judgment will not be arrested. Smith v. Cleveland, 6 Metc. (Mass.) 332 (1843).

venire de novo where it could be done, as the true course, but considered that this could not well be done in a court of error. In Joy v. Hill, 36 Vt. 333, the motion in arrest was disposed of on the ground of a misjoinder of counts, the question whether the expressions in more recent cases had abrogated the law, as declared in Wood v. Scott, being recognized but not considered. In 1865, the difficulty was removed by statute as far as declarations containing only counts for the same cause of action are concerned. R. L. § 913. In Dunham v. Powers, 42 Vt. 1, and in Kimmis v. Stiles, 44 Vt. 351 (decided since this enactment), the counts not being for the same cause of action, it was considered that judgment should be arrested.

In view of the misapprehension under which the rule was adopted, the position afterwards taken in regard to it, and the modern vindication in the English courts of the earlier and better practice, we are inclined to extend the benefit of a new trial to cases like this. Upon a mistrial of this character, we think the law may conveniently and properly give the litigants a more substantial justice than is afforded by an arrest of judgment. That the proposed action may properly be taken by this court is apparent from the settled practice of many courts of error. The nature of the proceeding is fully stated in Corner v. Shew, above cited. The theory is that the defect is in the verdict. The order is made, in the language of the ancient rule, "as upon an ill verdict." By sending back the case an opportunity is given to have the damages assessed upon the good counts only. The plaintiff will also be entitled to the usual privileges of amendment, under the rules of the trial court. * * *[37].

BULL v. MATHEWS.

(Supreme Court of Rhode Island, 1897. 20 R. I. 100, 37 Atl. 536.)

Trespass on the case for trover and conversion, joining counts in assumpsit. Heard on defendant's motion in arrest of judgment.

TILLINGHAST, J. This is a motion in arrest of judgment, on the ground of a misjoinder of causes of action. The action is trespass on the case for trover and conversion, and the declaration contains a count in trover and conversion and also the ordinary counts in assumpsit. At the trial of the case in the district court a decision was rendered in favor of the plaintiff for $19.10 and costs, but there is nothing in the record to show whether the judgment was based on the count in trover and conversion or on those in assumpsit. No plea was filed in the case, but, as the defendant entered an appearance, the general issue is deemed to be filed. Gen. Laws R. I. c. 237, § 3. But whether, in this case, the general issue as to the count in trover, which would be

[37] Hopkins v. Beedle, 1 Caines (N. Y.) 347, 2 Am. Dec. 191 (1803), semble. Accord.

not guilty, or as to the counts in assumpsit, which would be non assumpsit, is in, we have no means of determining. Within five days after the rendition of said decision the defendant filed his motion in arrest of judgment in the district court, whereupon the case was certified to this court.

It is a familiar rule of common-law pleading that counts sounding in tort cannot properly be joined with counts sounding in contract, and also that such misjoinder is fatal, not only on demurrer, but also on motion in arrest of judgment. 2 Enc. Pl. & Prac. p. 803, and cases cited; Haskell v. Bowen, 44 Vt. 579. The effect of such misjoinder is clearly expressed in Chit. Pl. (9th Am. Ed.) 206, as follows: "The consequences of a misjoinder are more important than the circumstances of a particular count being defective; for, in case of a misjoinder, however perfect the counts may respectively be in themselves, the declaration will be bad on demurrer, or in arrest of judgment, or upon error." See, also, Gould, Pl. c. 4, § 87, and cases cited.

The ordinary test for determining whether different causes of action may be joined is to inquire whether the same plea may be pleaded and the same judgment given on all the counts of the declaration, and unless this question can be answered in the affirmative the counts cannot be joined. See Drury v. Merrill, 20 R. I. 2, 36 Atl. 835. See, also, Court of Probate v. Sprague, 3 R. I. 205.

Applying this test to the case at bar, it will at once be seen that there is a fatal misjoinder. If the pleader in this case had simply omitted to strike out the money counts which are printed in the writ, perhaps we might disregard them; but, as he has filled them out in the ordinary way where the case is assumpsit, we feel bound to presume that he intended to rely thereon, as well as on the count in trover.

It is true that, since the case was certified to this court, the plaintiff's counsel has filed an affidavit setting forth that by reason of mistake and oversight he neglected to strike out the money counts, and also that at the trial in the district court the evidence introduced was confined to the count in trover, which was the only count relied on. But, as a motion in arrest of judgment raises only those objections which are apparent upon the record (State v. Paul, 5 R. I. 189; 1 Black, Judgm. §§ 96–98), and as the affidavit forms no part of the record, we are not at liberty to consider it.

Judgment arrested.[38]

[38] For many cases accord see 5 Ency. L. & P. 529, notes 22 and 23; 23 Cyc. 829, note 31. See, also, Rowley v. Shepardson, 83 Vt. 167, 74 Atl. 1002, 138 Am. St. Rep. 1078 (1910: venire de novo awarded). A fortiori such misjoinder is not cured by a default judgment. Whipple v. Fuller, 11 Conn. 582, 29 Am. Dec. 330 (1836); Hooker v. Quilter, 1 Wils. 171 (1747).

SAVIGNAC v. ROOME.

(Court of King's Bench, 1794. 6 Term R. 125.)

The declaration in this case began thus: The plaintiff complains of the defendant, etc., of a plea of trespass on the case, for that whereas the plaintiff, on, etc., at, etc., was possessed of a horse and chaise, which he was then and there driving on the highway, etc., and that the defendant was possessed of a certain coach, and two horses drawing the same, etc., which said coach and horses were then under the care, government, and direction of a certain then servant of him the said defendant, who was then driving the same in and along the highway aforesaid, etc., nevertheless the defendant by his said servant then and there in the highway aforesaid willfully drove the said coach and horses of the said defendant upon and against the said chaise of the said plaintiff, and then and there pulled, forced, and dragged the same between and against the said coach of the said defendant and a certain other coach there, whereby the plaintiff's chaise became and was crushed, broken, and damaged, etc. The defendant pleaded the general issue, and on the trial the plaintiff obtained a verdict.

Lord KENYON, C. J. It is of importance that the boundaries between the different actions should be preserved, and particularly in cases of this kind; for if in an action of trespass the plaintiff recover less than 40 s., he is entitled to no more costs than damages; whereas a verdict with nominal damages only in an action on the case carries all the costs. Here the whole frame and structure of the declaration shew that this is an action on the case; the memorandum, which we were desirous of seeing, is of "an action of trespass on the case." But in reality it should have been trespass. And the Stat. 16 and 17 Car. 2, was never meant to apply to a case of this kind. This is as much the cause of an action of trespass as if the servant had given the plaintiff a blow, because the injury was immediate. This falls directly with the principle of the case we so lately decided (Day v. Edwards, ante, vol. 5, 648); and therefore the judgment must be arrested.

ASHHURST, J. It appears from the frame of the declaration, and independently of the memorandum, to be an action on the case. And if it were in its inception an action of trespass on the case, the plaintiff cannot afterwards convert it into an action of trespass by means of the statute of Charles the Second. That is a very beneficial act; but it never meant to confound the boundaries of actions, and to enable the plaintiff to call his action what he pleased at first in order to meet the evidence at the trial, and afterwards to say it was intended to be a different kind of action. That act says that if in an action of trespass, which the plaintiff describes in his declaration as an action of trespass, he happen to omit the words "vi et armis" or "contra

pacem," the want of those words shall not vitiate the declaration. But where the action itself is misconceived, the act of parliament was never intended to cure such an objection.[39]

Rule absolute.[40]

SECTION 6.—JUDGMENT NOTWITHSTANDING VERDICT

PLUNKETT v. DETROIT ELECTRIC RY. CO.

(Supreme Court of Michigan, 1905. 140 Mich. 299, 103 N. W. 620.)

Case by Matthew Plunkett against the Detroit Electric Railway Company for personal injuries. There was judgment for defendant notwithstanding a verdict for plaintiff, and plaintiff brings error. Reversed.

MONTGOMERY, J. Plaintiff, a city fireman, was pipeman on a hose truck, which was proceeding west on High street at 7:45 p. m., February 2, 1900, when it was struck at Hastings street by a north-bound Hastings street car belonging to defendant. Plaintiff was thrown and injured. Plaintiff brought this action to recover for the injuries sustained, and on the trial under a charge submitting the question of defendant's negligence, and that of the contributory negligence of the plaintiff to the jury, a verdict was rendered in favor of the plaintiff for $2,500. Defendant thereupon entered a motion for judgment in its favor non obstante veredicto, for the reasons:

First. For that under the evidence given in said cause a verdict should have been directed by the court in favor of the defendant at the conclusion of the trial thereof.

Second. For that this court charged said jury, in substance and effect, that the said plaintiff, by and through the persons with whom he was riding, was guilty of contributory negligence.

This motion was granted, and judgment non obstante veredicto was entered for defendant. Plaintiff brings error.

The defendant and the court below mistook the practice. At the common law, judgment non obstante veredicto could be entered only when the plea confessed the cause of action and set up matters in avoidance which were insufficient, although found true to constitute

[39] The concurring opinion of Grose, J., is omitted. Lawrence, J., concurred.

[40] Slater v. Fehlberg, 24 R. I. 574, 54 Atl. 383 (1903), semble; Niles v. Brown, 25 R. I. 537, 56 Atl. 1030 (1904), semble; Lindo v. Gardner, 1 Cranch (U. S.) 343, 2 L. Ed. 130 (1803). Accord. Cruikshank v. Brown, 5 Gilm. (Ill.) 75 (1848); Toledo, etc., Co. v. McLaughlin, 63 Ill. 389 (1872), semble; Homan v. Flemming, 51 Ill. App. 572 (1894: by statute); Googins v. Gilmore, 47 Me. 9, 74 Am. Dec. 472 (1859), semble; Welker v. Metcalf, 209 Pa. 373, 58 Atl. 687 (1904: pleading over); Carson v. Hood's Ex'rs, 4 Dall. (Pa.) 108, 1 L. Ed. 762 (1790: pleading over). Contra.

a defense or bar to the action.[41] The rule was later relaxed, and made to apply in favor of the defendant, so that it is now generally held that the defendant is entitled to a judgment non obstante veredicto when the plaintiff's pleadings are not sufficient to support a judgment in his favor.[42] 11 Enc. Pl. & Pr. 912 et seq. So, too, if there be both a general and special verdict, and the latter be inconsistent with the former, judgment may, in some cases, be based upon the special verdict, disregarding the general verdict. But we know of no case in which it is proper practice to enter a judgment non obstante veredicto, unless it appears on the record that the verdict of the jury cannot be supported as matter of law. In all other cases the proper practice is to move for a new trial, or review the case on writ of error and exceptions. There must be either a general or special verdict to support a judgment, or the pleadings must authorize its entry. This question is ruled by Central Savings Bank v. O'Connor, 132 Mich. 578, 94 N. W. 11, 102 Am. St. Rep. 433. See, also, Schmid v. Frankfort, 134 Mich. 619, 96 N. W. 1056, and Montmorency Co. v. Putnam, 135 Mich. 111, 97 N. W. 399. Counsel for appellant has presented the case upon the assumption that the circuit court had power to consider the question which he assumed to pass upon, and has pointed out that the court mistook the rule as to imputed negligence, and that his holding is at variance with the ruling of this court in McKernan v. Detroit Citizens' St. Ry., 138 Mich. 519, 101 N. W. 812, 68 L. R. A. 347.

Defendant's counsel contend that there are other reasons why the verdict should have been for the defendant. We must decline to enter upon a consideration of these questions.

The judgment is reversed, and the case will be remanded, that the plaintiff may move for judgment on the verdict. Plaintiff will recover costs.

[41] "In later cases the motion has also been allowed not only where the defendant by an affirmative plea confesses but does not avoid the declaration, but also where besides an immaterial traverse the defendant pleads material pleas and loses the issues taken on them. Goodburne v. Bowman, 9 Bing. 532 (1833); Plummer v. Lee, 2 Mees. & W. 495 (1837); Negelen v. Mitchell, 7 Mees. & W. 612 (1841); Gregory v. Brunswick, 3 C. B. 481 (1846); Crossfield v. Morrison, 7 C. B. 286 (1849); Cook v. Pearce, 8 Q. B. 1044 (1843); Couling v. Coxe, 6 Dowl & L. 309 (1848). But where the only pleas are immaterial traverses a repleader is awarded. Atkinson v. Davies, 11 M. & W. 236 (1843); Duke of Rutland v. Bagshawe, 19 L. J. Q. B. 234 (1850)." Stephen, Pleading (Williston's Ed.) *108, note 1m.

[42] "When the plaintiff has the verdict, the defendant may move in arrest of judgment, but not for judgment non obstante veredicto. That is a motion which comes from the plaintiff when the defendant has the verdict." Bronson, J., in Bellows v. Shannon, 2 Hill (N. Y.) 86 (1841). Buckingham v. McCracken, 2 Ohio St. 287 (1853); Tillinghast v. McLeod, 17 R. I. 208, 21 Atl. 345 (1891), semble; Bowdre v. Hampton, 6 Rich. (S. C.) 208 (1853); Bradley Fertilizer Co. v. Caswell, 65 Vt. 231, 26 Atl. 956 (1893), disapproving Hackett v. Hewitt, 57 Vt. 442, 52 Am. Rep. 132 (1885). Accord. But see Tyler v. Flanders, 58 N. H. 371 (1878); Frank v. Gump, 104 Va. 306, 51 S. E. 358 (1905); 14 Am. Law Rev. 499. See, also, remarks of Parke, B., to counsel in argument in Queen v. Darlington Free Grammar School, 6 A. & E. (N. S.) 682, 703-705 (1844).

OTIS v. HITCHCOCK.

(Supreme Court of New York, 1831. 6 Wend. 433.)

Case of repleader. The defendant, in an action of assumpsit on a promissory note, pleaded non assumpsit and an insolvent discharge, exempting him from imprisonment. The plaintiff joined issue upon the first plea, and denied the granting of the discharge. The cause was tried, and the jury found for the plaintiff on the first plea, and for the defendant on the second. The plaintiff now moved for a general judgment non obstante veredicto, on the ground that the second plea does not allege that the defendant was an inhabitant of the county where the officer resided to whom the petition for his discharge was presented, or that he was imprisoned in such county. 1 Rev. Laws, 463, § 6; Laws of 1819, p. 117, § 4. The defendant insisted that a repleader should be awarded.

By the Court, MARCY, J. The plea setting forth the discharge is substantially defective. It does not set forth enough to show that the officer granting it had jurisdiction. It does not aver that the defendant was imprisoned in or a resident of Ontario county, when he made his application to the first judge thereof for his discharge. Is this a case for a repleader, or shall a general judgment be given for the plaintiff, notwithstanding the verdict for the defendant, on the issue formed by this plea? Where a plea is good in form, but not in fact, or, in other words, if it contain a defective title or ground of defence, by which it is apparent to the court, upon the defendant's own showing, that in any way of putting it he can have no merits, and the issue joined thereon be found for him, there, as the awarding the repleader could not mend the case, the court will at once give judgment non obstante veredicto; but where the defect is not in the title, but in the manner of serving it, and the issue joined thereon is immaterial, so that the court know not for whom to give judgment, there they will award a repleader. A judgment non obstante veredicto is always on the merits; a repleader, upon the form and manner of pleading. Tidd's Pr. 830, 1. The cases referred to by Mr. Tidd clearly illustrate the distinction pointed out by him. Lord Mansfield says: "Where a finding upon an issue does not determine the right, the court ought to award a repleader, unless it appear from the whole record that no manner of pleading the matter could have availed." Rex v. Phillips, 1 Burr. 301. Lord Holt, in Staples v. Heyden, 2 Ld. Raym. 924, took this distinction: Where the defendant confesses a trespass, and avoids it by such a matter as can never be made good by any sort of plea, judgment shall be given upon the confession, without regard to such an immaterial issue; but where the matter of the justification is such as, if well pleaded, would be a good justification, there, though it be ill pleaded, that shall not be taken to be a confession of the plaintiff's action.

Let us apply the doctrine of these cases to the one before us. We cannot say the defect is in the matter of the defence set forth in the second plea; there is a defect in the form of pleading the matter, in consequence of which we are unable to say with whom the right is. It does not appear whether the officer who granted the discharge had jurisdiction or not; and the issue, therefore, upon the fact of his having granted such a discharge, is immaterial. It determines no right, whether found for the one party or the other. This record then seems to show a case for a repleader. We cannot say, that in no way of pleading the defence which the defendant has attempted to put forth in his second plea, it cannot be good. We can see, that by a simple averment that the defendant was an actual resident of Ontario county when he presented his petition to Judge Howell, his plea would be a good one; and there is nothing in the facts set forth by him, to show that he cannot consistently with truth make that averment. If it had appeared affirmatively in the plea that the defendant, when he presented his petition to the first judge of Ontario, was not imprisoned in that county, but was actually an inhabitant of Monroe county, the plea would have shown a defective defence. The discharge not only might be, but of necessity must be in such a case void. It would not, by a defect in the form of the plea, have left it a matter of doubt whether the officer had jurisdiction or not; but it would have appeared positively upon the face of the plea, perfect in its form, that he had not jurisdiction. Inasmuch as this plea does not show that the discharge could not have been so pleaded as to be available as a defence, this is not a case for a judgment non obstante veredicto, but for a repleader.

Where a repleader is awarded, neither party is entitled to costs. Both parties are considered in fault; the defendant for putting in a defective plea, and the plaintiff for taking issue upon it, instead of demurring. 2 Ventr. 196; Sayer on Costs, c. 11.

Repleader awarded.[43]

SECTION 7.—ERROR

MAHER et ux. v. ASHMEAD.

(Supreme Court of Pennsylvania, 1858. 30 Pa. 344, 72 Am. Dec. 708.)

Certificate from the Court of Nisi Prius.

Action on the case for malicious prosecution, against Ashmead and Strong. Verdict for plaintiff against both. A new trial was

[43] For many cases applying the same rule, see 11 Ency. Pl. & Pr. 919, note 2, 920, note 2; 23 Cyc. 780, notes 2, 3, 4.

granted Ashmead, but denied Strong. Strong then moved in arrest of judgment. The court overruled this motion and entered judgment against Strong; which was here assigned for error.[44]

The opinion of the court was delivered by

PORTER, J. This action ought to have been trespass. The warrant was not a nullity only, but an absurdity. It charged the defendant "with absconding, or about to abscond, from the city," with moneys belonging to a certain estate "with intent to defraud heirs"—an improper act, but not obnoxious to the criminal law. The alderman could do nothing but discharge the party arrested. In appealing to the court for redress she mistook her remedy. Case was not the proper form of action. The arrest was not an abuse of lawful process. It was an act committed under a void and irregular writ. Every step was unlawful. The seizure of the person was an act of direct violence. The injury was no more consequential than if caused by a blow from a bludgeon. On turning to the record, we find the summons issued in case. In the declaration, the defendants are required to answer to a plea of trespass on the case. From every count the usual words, "force and arms," are omitted. In several counts, the defendants are charged with having falsely and maliciously caused and procured the plaintiff to be arrested by her body, and to be imprisoned and kept, etc.; words which do not necessarily imply the exertion of force on the part of the defendants. In one count, a conspiracy is charged, but so connected with the procurement and service of the vicious warrant, as to form but an entire act. These allegations do not set forth a trespass. In its very birth, therefore, the action contracted a malady liable to development in any stage of its life. A demurrer, or application for a nonsuit, would have ended it. On the motion made by the defendants to arrest the judgment, it should have been arrested, for the defect was not formal, but vital; not curable, but fatal. It presents itself also on this record, for the terms in which the warrant is set out show it to have been wholly irregular and void, and capable, therefore, of sustaining no other remedy. Where the defect appears on the face of the declaration, it is settled law that a court of error is bound to notice it. Having thus laid the axe at the root, it is unnecessary to enter upon the minute branches of the case.

Judgment reversed.[45]

[44] This statement is substituted for that found in the official report.

[45] For numerous casts in accord on appeal and error, see 3 C. J. 786, note 76.

"Before verdict the intendments are against the pleader, and upon demurrer to a declaration nothing will suffice, by way of inference or implication, in his favor. But on motion in arrest of judgment—and the same thing is true where the defect is sought to be availed of on error—the court will intend that every material fact alleged in the declaration, or fairly and reasonably inferable from what is alleged, was proved at the trial, and if, from the issue, the fact omitted and fairly inferable from the facts stated in the declaration may fairly be presumed to have been proved, the judgment will not be ar-

rested." Bailey, J., in Gerke v. Fancher, 158 Ill. 375, 380, 41 N. E. 982, 983 (1895). For many other cases recognizing and applying this rule on appeal or error, see 3 C. J. 779–785, notes 37–67.

"The declaration in offset is defective and very informal, at best, when considered under our statute and practice. It would doubtless have been adjudged bad on demurrer, and perhaps on a motion in arrest. But the plaintiff saw fit to plead the general issue to it, and did not move in arrest. Therefore as it counts upon the note with sufficient certainty, no question as to its sufficiency in other respects is properly before this court." Royce, J., in Keyes v. Waters, 18 Vt. 479, 482.

"No objection to the declaration is specified in the notice of the motion to set aside the judgment, nor in the motion itself. Had defects in it which would render it bad on demurrer been specified in either, it may be that such defects would be available here now for reversing the action of the court below. Whether the declaration would be good on demurrer, we are not, for this reason, called upon to say. It suffices that it purports to set up matter which, if well pleaded, would constitute a good cause of action." Poffenbarger, J., in Talbott v. Southern Oil Company, 60 W. Va. 423, 427, 55 S. E. 1009.

CHAPTER IV

CURING DEFECTS

SECTION 1.—EXPRESS AIDER

THE PROBATE COURT v. VAN DUZER.

(Supreme Court of Vermont, 1841. 13 Vt. 135.)

REDFIELD, J.[1] This is a suit upon an administrator's bond. A commission of insolvency issued, and the claim of the prosecutor, Eli N. Johnson, was allowed at $130.59. This suit is brought for the recovery of that sum.

The breaches assigned are, that Van Duzer, the administrator, did not render a true and just account of his administration, and that he has not faithfully administered, paid out, and distributed all the estate of the deceased; but, on the contrary, the debts due from the estate, and especially the prosecutor's, remain unpaid. This is obviously no sufficient breach of the bond to enable the prosecutor to maintain an action. After the issuing of a commission of insolvency, all proceedings for the collection of debts, due from the estate, in all courts, except the probate court, are suspended, until the commission is closed, and a final decree is obtained against the administrator for the payment of all the debts, or a dividend thereon, or until the account of the administrator is allowed by the probate court, and the debts, or a dividend thereon, passed to his credit, which is equivalent to a decree of distribution. Until such final decree of distribution, or upon the administrator's account, or the administrator has been cited before the probate court to render his account, and has failed to appear, no action can be maintained upon the bond of an executor, or administrator, of an insolvent estate. The probate court have exclusive jurisdiction of such account, and its adjustment cannot be drawn into another court. Dox v. Backenstose, 12 Wend. (N. Y.) 542; Newcomb v. Wing, 3 Pick. (Mass.) 168; Paine v. Stone, 10 Pick. (Mass.) 75. Paine v. Moffit, 11 Pick. (Mass.) 496. The same rule has been adopted in many of the other American states, in regard to estates represented insolvent. The liability in regard to solvent estates would, doubtless, be different. And the case of Warren v. Powers, 5 Conn. 373, is directly the reverse. That, too, seems to have been an estate settled by a commission of insolvency. But the

[1] The statement of facts is omitted.

point was not much considered, and we do not think the case rests upon the most convenient basis of proceedings. Had the defendants demurred, in this case, judgment must have been against the plaintiff, for the insufficiency of the declaration. But a defective declaration may be cured by the plea. Wood v. Scott, 13 Vt. 42. In the present case, the defendants, in their plea, admit that the administrator's final account was passed before the probate court, and in that account he was allowed for the payment of the prosecutor's full claim.

This supplies the defect in the declaration, and is conclusive upon the defendant as to Van Duzer's obligation to pay the full amount of the prosecutor's claim, for that was the matter directly adjudicated by the probate court. Sparhawk et al. v. Administrator of Buell et al., 9 Vt. 41.

But this adjudication will not avail the defendants for the purposes for which it is urged, that is, to show that Van Duzer has in fact paid the prosecutor's claim, for the question was never directly decided by the probate court. It was immaterial to the making up the account whether the debt had been in fact paid or not, if Van Duzer was liable to pay it, it would be passed to his credit, and his bond stand as security for the fulfilment of that obligation. So that the probate court having allowed Van Duzer to credit himself, in his account, the full amount of the prosecutor's claim, is conclusive upon him that he had assets for that purpose, and to that extent. The same point was decided in the case last cited.

The plaintiff, in his replication, treats the defendants' plea as being sufficient, unless avoided. This he attempts to do by alleging fraud in closing Van Duzer's account before the probate court. If that were the fact, it could only be corrected by application to that court to reexamine the account. The adjudication of that court, upon a matter exclusively within its jurisdiction, could not be thus collaterally impeached. Paine v. Stone, 10 Pick. (Mass.) 75. To this replication there is a demurrer.

The case presents rather an anomalous state of pleadings. The declaration is insufficient; that defect is cured by the plea; the plea is bad for all other purposes, and the replication is of a matter which cannot be tried in this suit, and is bad. But, upon the whole pleadings we are enabled to come at the justice of the case.

The judgment of the county court is reversed, and judgment that the replication is sufficient, and that the plaintiff recover his damages and costs. See Day v. Essex County Bank, 13 Vt. 97.[2]

[2] For numerous cases accord, see 31 Cyc. 714–716, notes 55, 57; 4 Ency. Pl. & Pr. 608. An express denial of the existence of a material fact, omitted from the adversary's pleading, or an allegation of the nonexistence of such fact, will, by the better view, cure such omission. Feibelman v. Manchester, etc., Co., 108 Ala. 180, 19 South. 540 (1895); Catlin v. Jones, 48 Or. 158, 85 Pac. 515 (1906); Bruce v. Beall, 100 Tenn. 573, 47 S. W. 204 (1898); 31 Cyc. 716. "The rule is that a party cannot rely upon allegations of his adversary to

SECTION 2.—PLEADING OVER

BAUMAN v. BEAN.

(Supreme Court of Michigan, 1885. 57 Mich. 1, 23 N. W. 451.)

COOLEY, C. J.[3] This is an action for assault and battery. The defendant was engineer of the Brush Electric Light Company, of Detroit, and the plaintiff was "oiler, laborer, and helper" under him. The plaintiff's case was, that leaving, in the afternoon of the day of the occurrence, lighted the fires under the boilers, as was his duty, the defendant came in, went to the top of the boilers upon a ladder, and finding the pressure of steam excessive, flew into a passion, and called the plaintiff vile names, and when plaintiff remonstrated, rushed down the ladder and struck him over the head with a club.

When the case was called for trial, the defendant objected to any evidence being given, assigning for reason that the declaration was defective. No defect was pointed out that was not amendable, if, indeed, it was a defect at all. The court allowed an amendment, and the case proceeded, against the objection of the defendant.

We cannot sanction the practice of pleading to the merits, and then raising at the trial an objection in the nature of a demurrer. It is every way an inconvenient practice, and it tends to make litigation unnecessarily expensive. If a declaration fails altogether to set out a substantial cause of action, and is incapable of being made good by amendment, the objection may be taken in any stage of the proceedings; but even then, for very obvious reasons of convenience, the questions of sufficiency ought to be disposed of before parties are put to the expense of preparation for trial. But if the objections to the declaration are not necessarily fatal, the defendant has no claim to the indulgence of a hearing upon them at the trial.[4] This we have decided in previous cases. Norton v. Colgrove, 41 Mich. 544, 3 N. W. 159; Barton v. Gray, 48 Mich. 164, 12 N. W. 30. Analogous cases are Lamb v. Jeffrey, 41 Mich. 719, 3 N. W. 204; Burke v. Wilber, 42 Mich. 327, 3 N. W. 861. * * *

We are of opinion that the judge, all through the trial, restricted the defendant in showing his excuse for the assault within too narrow limits. * * *

A new trial must be ordered. The other Justices concurred.

cure defects in his own pleadings, when in a subsequent pleading he denies such allegation." McBride, J., in John P. Sharkey Co. v. Portland, 58 Or. 353, 362, 106 Pac. 331, 114 Pac. 933 (1911).

[3] Portions of the opinion are omitted.

[4] For numerous cases holding that defects not subject to general demurrer are cured by pleading over, see 4 Ency. Pl. & Pr. 609; 6 Ency. Pl. & Pr. 372; 31 Cyc. 719, note 78.

SECTION 3.—WAIVER

INHABITANTS OF WEST ROXBURY v. MINOT.

(Supreme Judicial Court of Massachusetts, 1874. 114 Mass. 546.)

Contract to recover the amount assessed upon the defendant under Gen. St. 1860, c. 45, § 7, as his share of the expense of grading a sidewalk.

In the Superior Court, the case was submitted upon an agreed statement of facts. Judgment was ordered for the plaintiffs, and the defendant alleged exceptions.

ENDICOTT, J. This case comes within the rule stated in Roxbury v. Nickerson, 114 Mass. 544.

St. 1855, c. 43, gave cities and towns accepting the same authority to establish and grade sidewalks, and assess upon the abutters one-half of the expense thereof; such assessments to be a lien upon the abutting lands, as taxes are a lien upon real estate. This was the first general legislation on the subject. These provisions are re-enacted in Gen. St. 1860, c. 45, §§ 7, 8. The method for collecting such assessments thus prescribed by the statutes must be followed, the lien must be enforced by a sale of the land, and a town cannot collect such assessments in an action at law. Roxbury v. Nickerson, supra.

But the plaintiffs contend that the defendant, having submitted the case to the judgment of the court on an agreed statement of facts, cannot raise this question. Upon an agreed statement of facts, the only question open is whether the plaintiffs can recover upon any form of declaration or in any form of action. Ellsworth v. Brewer, 11 Pick. 316; Cushing v. Kenfield, 5 Allen, 307; Merrill v. Bullock, 105 Mass. 486. Such statement waives all defects in pleading. Brettun v. Fox, 100 Mass. 234; Kimball v. Preston, 2 Gray, 567; Folger v. Columbian Ins. Co., 99 Mass. 267, 277, 96 Am. Dec. 747; Roger v. Daniell, 8 Allen, 343, 349. But this is the extent of the rule. It does not apply where the subject-matter of the suit is such that no action at law lies for its recovery. Taxes on real estate, being a lien on the estate, can only be enforced by the sale of the estate itself; and an agreed statement of facts, signed by the parties, does not give the court jurisdiction to collect them, the statute being decisive as to the method of collecting.

By the agreed statements of facts, therefore, the defendant waived all technical objections to the pleadings and form of action,[5] but he

[5] In addition to the cases cited in the opinion, see Hamilton v. County of Cook, 4 Scam. (5 Ill.) 519 (1843), semble; Machias Hotel Co. v. Fisher, 56 Me. 321 (1868); American Coal Co. v. County Commissioners, 59 Md. 185 (1882); Bixler v. Kunkle's Ex'rs, 17 Serg. & R. (Pa.) 298 (1828), semble; Sawyer v.

did not waive the question whether, in any form of action, the plaintiffs can recover taxes on real estate.

The cases cited by the plaintiffs were decided upon the special provisions of the charter of the city of Lowell, and do not apply to cases arising under this statute. Lowell v. Wentworth, 6 Cush. 221; Lowell v. French, 6 Cush. 223; Lowell v. Wyman, 12 Cush. 273.

Judgment for the defendant.

FOLSOM v. BRAWN.

(Superior Court of Judicature of New Hampshire, 1852. 25 N. H. 114.)

Case for slander. The declaration alleged that a certain trial at law was had between Brawn, the defendant, and one Samuel Prescott, at Ossipee, in the county of Carroll, on the second Tuesday of November, 1846, on which trial Leonard S. Folsom, the plaintiff in this suit, was a witness for Prescott, and that afterwards Brawn, the defendant, charged Folsom with having committed perjury in his testimony given upon that trial.

The defendant pleaded the general issue and filed therewith a brief statement as follows:

"The plaintiff will take notice that the defendant, on the trial of the above issue, will prove that the plaintiff, on the trial of the action George W. Brawn against Samuel Prescott, in the court of common pleas, holden at Ossipee, in the county of Carroll, on the second Tuesday of November, A. D. 1846, did testify that he was at the blacksmith shop of Enoch Prescott, in Meredith, in March, 1845, when said Brawn came there, and was there all the time he, said Brawn, continued there with said Samuel Prescott, and heard the conversation that said Brawn had with said Samuel Prescott, concerning a sore on a certain colt. Now the said Brawn says said Folsom was not present during the conversation aforesaid, and no such conversation was had between said Brawn and Prescott, as testified by said Folsom, and that whatever said Brawn may have said concerning the testimony of said Folsom on said trial was as to said presence and conversation, and none other." * * *

EASTMAN, J. We have had some hesitancy in regard to the effect which should be given to the brief statement which was filed in this case, but the result of our consultation is that it must be held defective. A brief statement is a substitute for a special plea, and where it purports to give notice of matter which is a full answer to the plain-

Corse, 17 Grat. (Va.) 230, 94 Am. Dec. 445 (1867); Saltonstall v. Russell, 152 U. S. 628, 14 Sup. Ct. 733, 38 L. Ed. 576 (1894). Accord.

Amendable defects in pleadings are cured by a reference by consent. Ames v. Stevens, 120 Mass. 218 (1876); Smith v. Minor, 1 N. J. Law, 16 (1790); Moulton v. Moore, 56 Vt. 700 (1884), semble. See, also, McKay v. Darling, 65 Vt. 639, 27 Atl. 324 (1893).

tiff's declaration, it should contain all the substantial elements of a special plea. Precision and exactness are not necessary, but substance is essential.

When a defendant in an action of slander justifies by his plea the speaking of the words charged, he must do it with distinctness and point, and not in an argumentative and evasive manner, nor in general and uncertain terms. Had the substance of this brief statement been embraced in a special plea, it would manifestly have been bad on demurrer. The speaking of the words is not fully and distinctly admitted and justified, as should be the case when a defendant places himself upon the broad ground of truth in the charge which he has made.

If a brief statement is defective and insufficient, the proper practice is to move the court to reject it. The party will then be obliged to put his statements into a substantial and definite form, or the brief statement will be stricken out. Or a party may object to evidence as it is offered, which would be admissible under a sufficient brief statement, as inadmissible under a defective one. The former practice, of moving to reject the brief statement, is preferable, however, as the parties will then go to trial without any uncertainty as to their position.

Holding this brief statement to be insufficient, had the plaintiff moved to reject it, or had he excepted to the defendant's evidence, as it was offered, as being inadmissible under the brief statement, he would have prevailed. But it appears that it was not till after the evidence in the cause was closed that the plaintiff requested the court to rule in regard to it. It appears also that it was left to the jury to find whether Folsom perjured himself at the trial at Ossipee or not. The cause then must have been tried as though the brief statement were full and definite; and we do not see that the plaintiff has sustained any injury by the deficiency in the brief statement or the neglect to move to reject it. The jury by their verdict have negatived the charge of perjury, and the court distinctly instructed them that the evidence introduced by the defendant was not to be regarded by them in mitigation of damages, but as a defence to the plaintiff's right of recovery. At all events it was too late to raise the question after the evidence in the cause was all in, and a trial had, as upon a sufficient brief statement.[6] * * *

Judgment on the verdict.[7]

[6] A portion of the statement of facts and of the opinion is omitted.

[7] It seems to be well settled that a defective statement of a cause of action will be cured by evidence received without objection, but there is a conflict of authority as to whether a total failure to state a cause of action can be so cured. See 31 Cyc. 723, and cases cited.

Even the absence of plea or replication will be waived if the parties proceed to trial as if the plea or replication were on file. First National Bank v. Miller, 235 Ill. 135, 139, 85 N. E. 312 (1908); 18 Ency. Pl. & Pr. 650, and cases cited; 31 Cyc. 733, note 78.

SECTION 4.—DEFAULT AND VERDICT

DUNN v. SULLIVAN.

(Supreme Court of Rhode Island, 1902. 23 R. I. 605, 51 Atl. 203.)

TILLINGHAST, J. This is trespass and ejectment, and is before us on the defendant's motion in arrest of judgment.

The facts are these: The action was brought in a district court, where the defendant entered an appearance, and, after several continuances, decision was rendered for the plaintiff for possession and costs. The defendant thereupon claimed a jury trial, and the case was duly certified to the common pleas division of this court, and after several assignments was finally, on December 6, 1901—the day on which it had been finally assigned for trial—called and defaulted, and decision rendered for the plaintiff for possession and double costs.

Whereupon, on December 7, 1901, the defendant filed said motion in arrest of judgment, and the case was certified to this division for the trial thereof.

The grounds upon which the motion is based are (1) that the declaration states no cause of action, as no seisin in the premises sued for is alleged to be in the plaintiff, and that the title of plaintiff is not set forth so explicitly that a judgment in her favor will determine the character of her estate; and (2) that the declaration does not sufficiently describe her estate, in terms explicit enough to determine title to the same.

That part of the declaration which is in question is as follows: "For that the said defendant, at said Pawtucket, on the 28th day of March, 1900, with force and arms, wrongfully detained from the plaintiff possession of a certain tenement to the plaintiff belonging,—being the house located at the corner of Hurley and Bloomingdale avenues, in said Pawtucket,—and, with like force and arms, wrongfully detained possession of the same from the plaintiff, against the peace."

That this declaration was demurrable under the decision of this court in Taylor v. O'Neil, 15 R. I. 198, 2 Atl. 299, there can be no doubt. It does not set forth the title of the plaintiff to the premises in question so explicitly that a judgment in her favor will determine the character of her estate, and not simply her right of possession.

The question presented for our decision, therefore, is whether, the declaration being demurrable, the motion in arrest of judgment must be granted.

The general rule is that any defect in the declaration which would be fatal on demurrer is also fatal upon a motion in arrest of judgment. State v. Doyle, 11 R. I. 574; 2 Enc. Pl. & Prac. 796, and cases in note 2.

The principal exception to this rule is that where the matter which

constitutes the defect is so essentially necessary to be proved that, had it not been given in evidence, the jury could not have given such a verdict, there the want of stating that matter in express terms in the declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by a verdict.

In support of this statement of the law, the observations of Mr. Sergeant Williams, as quoted in Steph. Pl. p. 148, are pertinent. He says: "Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet, if the issue joined be such as necessarily required on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict."

Ward v. Bartholomew, 6 Pick. (Mass.) 409, was a writ of entry, in which the plaintiff claimed an undivided third part of a certain tract of land, "whereof the tenant unjustly," etc., "disseised the demandant within thirty years." The tenant pleaded non desseisivit.

Upon motion in arrest of judgment after verdict for the plaintiff, the court said: "This declaration, though it alleges no seisin in the demandant, avers that he was disseised by the tenant. Now, it is plain that such a verdict could not have been returned without proof of a seisin by the demandant, for he could not be disseised without having been seised; and no court could have allowed, nor could any jury have agreed in, that verdict, unless there was sufficient evidence of the fact without proof of which the demandant could not have advanced a step on the trial. It is true that a seisin only can be inferred from the declaration, plea, and verdict, and that the case is still left destitute of any averment or even implication of the nature and extent of the seisin. But if seised and disseised, the demandant is entitled to judgment, and it may be a subject of future inquiry to what extent this judgment will affirm his title. If only to a freehold, still he is entitled to be reseised." See, also, Smith v. Cleveland, 6 Metc. (Mass.) 332; Bartlett v. Crozier, 17 Johns. (N. Y.) 458, 8 Am. Dec. 428; Shaw v. Redmond, 11 Serg. & R. (Pa.) 30; Irons v. Field, 9 R. I. 216; Black, Judgm. § 98; 3 Bl. Comm. 394; Perry, Comm. Pl. 237, 238; 2 Tidd, Prac. 918.[8]

In view of the law as thus stated, we think the defect in the declaration before us, although one of substance, and not merely of form, would have been cured by a verdict in favor of the plaintiff. But there has been no trial of the case, and hence there is no verdict in aid of said defect. Nor has there been any trial of the case by the court, which probably would have been equally effective in aid of the defect

[8] For cases as to defects in pleadings cured by verdict, see Bedell v. Stevens, p. 542, supra; City of Elgin v. Thompson, p. 546, supra; Bull v. Matthews, p. 549, supra; Savignac v. Roome, p. 551, supra, and the notes thereto.

as the verdict of a jury. The record shows that the case was simply defaulted, and a decision rendered thereon in favor of the plaintiff. The case, therefore, practically stands as though it were before us on demurrer to the declaration, and hence we feel compelled to grant the motion in arrest of judgment. Gould's Pl. (Ed. 1849) p. 505, § 26.

The case is remitted to the common pleas division, with direction to arrest the judgment.[9]

SECTION 5.—AMENDMENTS

AUBEER v. BARKER.

(Court of King's Bench, 1746. 1 Wils. 149.)

It was moved on behalf the plaintiff to amend his declaration, by adding two counts; this application to the court was made after the term next after the term in which the declaration was delivered, and after the defendant had pleaded thereto.

WRIGHT, Justice (absente LEE, C. J.). I take it to be the rule of the court, that a count cannot be added after two terms, and the term in which the declaration is delivered is always included; as to the case of the Dutchess of Marlborough v. Widmore, Hil. 4 Geo. 2. in B. R. the amendment in that case was allowed on a particular reason, for if it had not been there allowed, the action would have been lost by the running of the statute of limitations. DENNISON and FOSTER, Justices, of the same opinion; and so the rule to shew cause why the amendment should not be made was discharged: but N. B. Another reason for discharging the rule was, because the defendant was in actual custody; and this was the third term he had been so; and this would be making a new declaration to keep him in prison so much the longer.

[9] This doubtless is the orthodox rule. Hoyt v. Macon, 2 Colo. 113 (1873), semble; Warren v. Harris, 2 Gilman (7 Ill.) 307 (1845), semble; Emerson v. Lakin, 23 Me. 384 (1844), semble; Hemmenway v. Hickes, 4 Pick. (Mass.) 497 (1827); Roe v. Baker, 4 Leigh (Va.) 416, note (1833); Collins v. Gibbs, 2 Burr. 899 (1759); 1 Wms. Saund. 227, note 1; Gould, Pleading (Hamilton's Ed.) 484; 16 Ency. Pl. & Pr. 122. But in some states, by statute, default has substantially the same effect in curing pleadings as has a verdict. Elliott v. Farwell, 44 Mich. 186, 6 N. W. 234 (1880); Ragsdale v. Caldwell, 2 How. (Miss.) 930 (1838). And in some states the same result seems to be reached without statute. Swope v. Sherman, 7 Ala. App. 210, 60 South. 474 (1912), semble; Williams v. Bank, 1 Cold. (Tenn.) 43 (1860). See, also, Buck v. Citizens, etc., Co., 163 Ill. App. 637 (1911); Id., 254 Ill. 198, 98 N. E. 228 (1912).

TOBIAS v. HARLAND.

(Supreme Court of New York, 1828. 1 Wend. 93.)

Motion to amend narr. The declaration is in slander, for words spoken injurious to the plaintiff, as a dealer in watches of a particular description. In the inducement in the declaration, and in the ac etiam clause of the capias, the plaintiff is alleged to be a manufacturer of watches, and that the words were spoken in reference to his trade and business, as such manufacturer. From a commission to take testimony, just returned from Liverpool, it appears that the plaintiff is not the manufacturer of the watches spoken of, but that they are manufactured expressly for him, and forwarded to him from Liverpool. Issue was joined in August, 1827. The commission was returned on the 17th day of July last. The plaintiff's attorney states, that he was not aware of the necessity of an amendment, until after the return of the commission, and that more than two years have elapsed since the accruing of the action.

By the Court, SAVAGE, C. J. The plaintiff is entitled to amend, on payment of costs, especially, as otherwise his action will be lost by the running of the statute. The defendant has leave to plead anew.[10]

BETTS v. HOYT.

(Supreme Court of Errors of Connecticut, 1840. 13 Conn. 469.)

Action on a promissory note. After verdict for plaintiff defendant moved in arrest of judgment because the declaration failed to show at what time the money was due or demandable. Judgment was arrested. Thereupon plaintiff moved for leave to amend the declaration by inserting an allegation that the note was due on demand. The defendant objected that no such motion could at this time be legally made. The questions arising on this motion were reserved for the consideration and advice of this court.[11]

CHURCH, J. The allowance, or disallowance, of amendments, is within the discretionary power of the courts, in the absence of statute regulations. The time beyond which an amendment may not be allowed has not been prescribed, by any statute of this state. At common law, amendments of pleadings have been permitted at any time before judgment. Co. Litt. 280; 1 Petersd. Abr. 504, 539, a.

[10] Beard v. Simmons, 9 Ga. 4 (1850); Sanger v. City of Newton, 134 Mass. 308 (1883); Stoner v. Erisman, 206 Pa. 600, 56 Atl. 77 (1903). Accord. See Allen v. Tuscarora, etc., Co., infra, p. 585; Neubeck v. Lynch, infra, p. 576, and notes thereto.

[11] This statement of the case is substituted for that in the official report.

And the same has been permitted, in special cases, in the state of New York and by the courts in other states. Lion v. Burtis, 18 Johns. 510; Sargent v. Dennison, 2 Cow. 515; Rees v. Overbaugh, 4 Cow. 124; Daley v. Atwood, 7 Cow. 483; Mott v. Jerome, 7 Cow. 518.

In this state the courts, in the exercise of their discretionary power, in ordinary cases, have refused to sanction amendments of pleadings, after they have been adjudged insufficient, upon motion in arrest. 1 Sw. Dig. 779. And the present motion discloses nothing which should induce us to depart from established practice in such cases: and by doing so we fear we might encourage a negligence and laxity in pleading and practice, which would prove very inconvenient, both to the bar and the court; and we must therefore advise the superior court to deny this motion.

But, at the same time, had the motion set forth facts which had satisfied us that a serious and irretrievable loss would have resulted to the plaintiff from a refusal of this amendment beyond the mere loss of a bill of costs, and the expense and delay of commencing and prosecuting another action, such as a loss of the debt, by the operation of the statute of limitations, or discharge of the lien created by attachment, etc., we should have believed that a just exercise of the discretionary power of the court would have sanctioned the amendment prayed for. In the case of Aubeer v. Barker, 1 Wils. 149, the court said that it was a rule of that court that a new count could not be added, after two terms; and yet this had been permitted to prevent the loss of the debt by the statute of limitations. The Duke of Marlborough's Ex'rs v. Widmore, 2 Str. 890; 1 Petersd. Abr. 531; Dartnall v. Howard et al., 2 Chitt. Rep. 28.

In this opinion the other Judges concurred.

Amendment not allowed.[12]

DIAMOND v. WILLIAMSBURGH INS. CO.

(Court of Common Pleas of New York, 1873. 4 Daly, 494.)

The defendant moved, at the Special Term, to amend his answer by setting up a new and additional defense. The plaintiff insisted that the court had no power to allow it, and relied upon the decision of the general term of the Superior Court, in the case of Woodruff v. Dickie, 31 How. Prac. 164; Id., 5 Robt. 619.

[12] "In that case [Betts v. Hoyt, 13 Conn. 469 (1840)] the amendment was in fact allowed, on a new motion showing such danger of loss, and by one of the judges who sat upon and concurred in the decision of the Supreme Court. That case is a sufficient precedent for this." Butler, C. J., in North v. Nichols, 39 Conn. 355, 357 (1872).

In most jurisdictions statutes authorize amendments in furtherance of justice at almost any stage of the proceeding. See 1 Ency. Pl. & Pr. 590–620; 3 Ency. L. & P. 735–780; 31 Cyc. 393–407.

DALY, C. J.[13] I entertain no doubt of the power of the court to allow a defendant to amend his answer before trial, by setting up an additional defense, if it be in furtherance of justice. Under the old practice, a plaintiff would not be allowed to amend his declaration if the amendment would change the nature of the action. Cope v. Marshall, Sayre, 234; Duchess of Marlborough v. Wignian, Fitzg. 193. But the rule was not so strict in respect to amending pleas, or adding a new and different plea as a defense to the action, the reason given being that the plaintiff, if he has misconceived the form or nature of his action, can discontinue and bring a new action; whereas the defendant must avail himself of his defense in the action brought against him. Waters v. Bovill, 1 Wils. 223; Cope v. Marshall, Sayre, 234. The defendant would, therefore, be allowed to amend his pleading at a stage of the case when the plaintiff would not be allowed to amend his declaration (Waters v. Bovill, supra; Skeet v. Woodward, 1 H. Bl. 238), and to amend by setting up a new defense (Dryden v. Langley, Barnes, 22; Prior v. Duke of Buckingham, 8 Moore, 584; Hubert v. Steiner, 4 Moore & S. 228). The code has not changed the law in this respect. Its provisions, in relation to the amendment of pleadings, were designed to be more broad and liberal even than the former practice. The codifiers say, in respect to this very section authorizing the amendment of pleadings and proceedings (then section 149), that their object was (I use their own language) "to provide a means of amendment of the most liberal character; as liberal, indeed, as we could devise." First Report of Commissioners, 1848, p. 158.

It was held by the Superior Court, in Woodruff v. Dickie, 31 How. Prac. 164; Id., 5 Robt. 619, Chief Justice Barbour dissenting, that under the code the court has no power to allow, by amendment, the insertion of a new or different cause of action or defense. Judge Monell, who delivered the prevailing opinion, says that neither at common law nor under any of the previous statutes was such a power ever claimed; and the decision of the special term was affirmed upon the ground that the court had no power to allow a defendant to amend his answer by setting up a new defense.

With all due respect for the very able court by whom this decision was rendered, I think the conclusion arrived at was erroneous. The four authorities cited in support of it are, with one exception, cases in which the plaintiff applied to amend his declaration by setting up a new cause of action, and are in accordance with the old practice, as I have previously stated it; that an amendment of a declaration would not be allowed where it would change the nature of the action. * * * In the last case cited, Trinder v. Durant, 5 Wend. 72, the defendant applied to amend a plea in abatement, not by setting up a new defense, but to perfect his plea by adding some additional names of persons jointly liable that had been omitted and by striking out the names of

[13] Portions of the opinion are omitted.

others that had been erroneously inserted, which application was refused, because a plea in abatement, being a dilatory plea, was not at common law amendable,[14] and the court thought that the provision in the Revised Statutes did not apply, as the amendment of such pleas, in the language of the statutes, was not "in furtherance of justice." There is, therefore, nothing in the authorities warranting the conclusion that an answer cannot be amended by setting up a new and different defense; whilst in the following cases, decided both before and since the code, the defendant, after issue joined, was allowed to amend, not only by varying an existing defense, but by setting up a new defense. Dryden v. Langley, Barnes, 22; Prior v. The Duke of Buckingham, 8 Moore, 584; Hubert v. Steiner, 4 Moore & Scott, 328; Beardsley v. Storer, 7 How. Prac. 294; Harrington v. Slade, 22 Barb. 161; Macqueen v. Babcock, 13 Abb. Prac. 268; Van Ness v. Bush, 22 How. Prac. 491; Union National Bank of Troy v. Bassett, 3 Abb. Prac. (N. S.) 359; Ford v. Ford, 53 Barb. 526.

Judge Monell in his opinion in this case of Woodruff v. Dickie says that an amendment is the correction of an error or mistake in a pleading already before the court, that there must be something to amend by, and that the insertion of facts constituting a new cause of action or defense is a substituted pleading and not an amendment. This is a very narrow definition of an amendment, and is not warranted either by the etymology of the word, nor by the practice respecting amendments, as it has existed from the earliest period.

Originally at the common law all pleadings were oral at the bar of the court, and were amendable for defects of form or substance at any time before they were recorded by the judges as the foundation for their judgments (Garner v. Anderson, 1 Str. 11; Gilbert's Common Pleas, CX), which was any time during the term, and by a statute subsequently passed (14 Edw. III), it might be allowed during the next term. To use the language of the court in Rush v. Seymour (10 Mod. 88), "If any error were spied in them, it was presently amended;" that is, before the roll of that term was made up, or engrossed as the final record of its proceedings (Blackmore's Case, 8 Co. 157); for, says Coke in the case cited, "during the term the record is in the breast of the court, and not in the roll;" or, as the practice is more distinctly set forth in an anonymous case in 3 Salk. 31, in which it was ruled that "whilst the declaration is in paper, the court may give leave to amend anything in it at pleasure," and "during the term might amend any mistake in the roll at common law; the roll being only the remembrance of the court during the term," but that "after the term, the court could not amend any fault in the roll, for then the record is not in the breast of the court, but in the roll itself." When the record for the term was made up, it could not by the common law,

[14] The weight of authority is accord. 3 Ency. L. & P. 623; 1 Ency. Pl. & Pr. 519; 31 Cyc. 424.

under heavy penalties, be altered, erased, or amended, even by the judges, unless they were specially authorized to do so, that power resting exclusively in the king and his council. Britton, B. I, c. 1, § 11. When the custom of oral pleading ceased, and all pleadings were required to be in writing, a motion to amend the pleading succeeded to the former practice. This motion, it is said in Rush v. Seymour, supra, "the court cannot refuse whilst the pleadings are in paper," that is, before they were entered of record; but the same authority states that the court has a discretion, and may refuse, if the party applying for the amendment refuse to pay costs, or the amendment amount to a new plea, the word "plea" being here used in its generic sense, as applicable to the pleading of either party. The course of procedure after this change was made, and the nature of it, is thus explained by Chief Justice Parker in Garner v. Anderson, Str. 11: "The foundation of amendments by the court whilst the proceedings remain in paper, before they be recorded, is that these papers delivered to and fro supply the declaring and pleading ore tenus at the bar, and may be amended as easily as spoke at the bar."

The pleadings were "in paper" until the record or rolls for the trial were made up, engrossed, sealed at the nisi prius office and docketed. 1 Clerk's Inst. 153; 2 Tidd's Pr. (9th Ed.) 728.

Up to this time, the engrossment and sealing of the plea and issue rolls, the greatest liberality appears to have prevailed in allowing amendments, especially on the part of the defendant, except where he had interposed a dilatory plea, such as a plea in abatement (Lepara v. German, 1 Salk. 50), or where, by pleading defectively and compelling the plaintiff to demur, the plaintiff had lost a trial (Jordan v. Twells, Cases temp. Hard. 171). The power was not limited, as Judge Monell supposes, simply to a correction of an error or mistake in a pleading already before the court. Baron Gilbert, the very highest authority on such a subject, says that it was debated amongst the judges at Sergeant's Inn whether a plaintiff could amend his declaration after the defendant demurred and the plaintiff had joined in demurrer, and he says that their conclusion was that he could, if the cause were still in paper, on payment of costs, liberty being given to the defendant to change his plea; and he gives the reason as follows: "Because the pleading in paper came in only instead of the ancient way of pleading ore tenus; and in the pleading ore tenus the record was only in fieri; and therefore, though a man had joined in demurrer, he might come before that was entered on record and pray to withdraw his demurrer and amend; but after the pleadings were entered on record of the same term, then it could not be altered or amended." Gilbert's Common Pleas, pp. 114, 115. That this was the practice appears still more conclusively from a case in 2 Salk. R. 520, in which it is said: "Since pleading in paper is now introduced instead of the old way of pleading ore tenus at the bar, it is but reasonable

after a plea to issue or demurrer joined, that, upon payment of costs, the parties should have liberty to amend their plea, or to waive their plea, or demurrer, while all proceedings are in paper." If a party therefore may waive his plea, it is something more than correcting an error or mistake in a plea already before the court. It is what Judge Monell thinks cannot be done, for he says a pleading containing a new defense "is a substituted pleading and not an amendment," but if, as these early authorities show, either a plaintiff or defendant will be allowed to amend after his pleading is demurred to, by substituting either another declaration or another plea, it is very clear that Judge Monell's impression of the practice was erroneous.

In Prussett v. Martin, Gilb. C. P. 113, the plaintiff was allowed to amend by filing a new bill, although there was nothing to amend by; and in the cases already cited (Waters v. Bovill, 1 Wils. 223; Dryden v. Langley, Barnes, 22; Prior v. The Duke of Buckingham, 8 Moore, 584; and Herbert v. Steiner, 4 Moo. & Scott, 328) the defendants were allowed to add additional pleadings, setting up separate and distinct defenses.

The word "to amend" has not and never had, either etymologically or legally, such a restricted sense as the learned judge puts upon it. It came into our language from the French "amender," the root or parent word being "menda," a fault, and means in its most comprehensive sense "to better." It is so defined by all the leading lexicographers. Thus in Phillip's New World of Words, and in Kersey, and in Bailey, one of the definitions, is "to make better"; by Johnson "to change from bad for the better"; by Webster "to change in any way for the better * * * by substituting something else in the place of what is removed." As a law term, the simple definition of amendment given by Rastall, Cowell or Blount, our earliest expositors of law terms, is the espying out of some error in the proceedings and the correcting of it before judgment and after, if the error be not in the giving of the judgment, the remedy in that case being by writ of error. When, therefore, a defendant is allowed to withdraw a plea or answer, because it does not set up the defense which he has, and put in its stead a plea or answer which does, it is a change for the better, and is therefore an amendment as defined by the lexicographers; nor is the statement correct that an amendment can be allowed only where there is something to amend by, for amendments have been allowed where that objection existed and the point was expressly taken. Carr v. Shaw, 7 Term R. 299; Rutherford v. Mein, 2 Smith, K. B. 392; Gilbert's Com. Pleas, p. 116 (3d Ed.). Under the various statutes of jeofails, enacted to relieve the prevailing party, notwithstanding certain omissions or defects in the record, the general rule was that there must be something in the record to amend by or to enable the statute to take effect, and yet, notwithstanding this general rule, Tidd says, and quotes the cases in support of his statement, that the courts

have in particular instances permitted the plaintiff to amend his declaration after issue joined, in cases where there was nothing to amend by. Tidd's Practice, p. 713 (9th Lond. Ed.). In respect to the plaintiff's right of amendment, the court did impose some restriction, even while the pleadings were in paper, for the reason already stated, that the plaintiff can sue again. Thus he would not be allowed to amend his declaration after two terms had elapsed, because if he had not declared within that time, the cause would have been out of court, and having declared defectively they gave the defendant the benefit of the time that had elapsed, treating the amendment as equivalent to a new declaration. For this reason the plaintiff in such a case was left to sue over again. But this reason did not apply to pleas, which Tidd says "may be amended at any time as long as they are in paper" (1 Tidd, p. 708). Nor would they allow an amendment changing the nature of the action, but would, for the same general reason, leave the plaintiff to bring another action. But even these rules were not strictly adhered to; for if the statute of limitations would be a bar to a new action, they would allow the amendment upon terms; and the restriction that the plaintiff would not be allowed to amend after two terms had elapsed was in course of time greatly relaxed in practice. Bearcroft v. The Hundred, etc., 3 Lev. 347; Duchess of Marlborough v. Wignian, Fitzg. 198; Cope v. Marshall, Sayre, 234; Freen v. Cooper, 6 Taunt. 358; Horston v. Shilston, 6 Moore, 490; Garway v. Stevens, Barnes, 19; Tidd's Practice, pp. 697, 698. But I nowhere find, except where he pleaded matter in abatement, or defectively for the purpose of delay, that any restriction was ever placed upon the defendant's right to apply for an amendment of his pleading whilst the pleadings were in paper, whether it related to his setting up an additional defense or not, and it would be very unjust if it were so; for, as I have said, he must avail himself of his defense if he have any, in the action brought against him, and the reason given in the plaintiff's case that he may sue again is in no way applicable to the defendant's case. When the pleadings were made up in the form of a record, the practice was more strict; but even then amendments would be allowed in the discretion of the court, if there were anything to amend by (Barnes, 3, 7, 10; 2 Clerks' Instruction, 206, 207); for then an amendment involved an erasure or alteration of what was on record, for the plea and the issue rolls were carefully engrossed, sealed and docketed with the clerk, as was also the nisi prius record; the latter being in the nature of a commission to the judges for the trial of the issue which was also sealed and entered, forming with the rolls, when all this was done, a portion of the record in the cause. This was the practice formerly in this state (Wyches' Practice, 146; Caines' Practice, 502); but it has long since been abrogated. Under the code the clerk, after entering judgment, simply attaches all the necessary papers together and files them as the judg-

ment roll in the cause; so that until the clerk enters the judgment the pleadings are with us, to use the English term, still "in paper." Up to this time, or rather up to the time of the trial, no inconvenience to the court can arise from allowing them to be amended upon terms, and any reasons which may have heretofore existed under the early practice in this State and in England for restricting the power of amendment, upon the ground that the rolls had become a part of the record, are no longer of any force, as there is now no such course of procedure.

The courts were at first very strict in permitting amendments of anything that had taken the form of a record, for records in England were made up with great formality, and much importance was attached to their being preserved without change or erasure. At first they were not allowed to be altered at all, then only for mistakes made by the clerks; but afterwards, as was said, "in furtherance of justice and to obtain right between the parties," the amendment of them was greatly extended. The King v. Ellames, Cases Temp. Hardw. 48. Lord Hardwicke says, in Jordan v. Twells (Cases Temp. Hardw. 171), "Formerly in all amendments the party was to show that the proceedings were all in paper, though of late that has been got over." And finally the power was so much extended that in The King v. The Mayor, etc., of Grampond, 7 Term. R. 703, Lord Kenyon says that, where the defect does not come under any of the statutes of jeofails, but the allowance is made under the general authority of the court, each particular case must be left to the discretion of the court. He reiterates the wish expressed by Lord Hardwicke, that "these amendments were reduceable to some certain rules," which he considers equivalent to declaring that there are none, and he then says that the best principle seems to be that on which Lord Hardwicke relied, "that an amendment shall or shall not be permitted to be made as it will best tend to the furtherance of justice." This is brushing away all previous distinctions, and prescribing as the only criterion that which is adopted in the Revised Statutes, that "the court in which any action is pending shall have power to amend any process, pleading, or proceeding, either in form or substance, for the furtherance of justice, upon such terms as shall be just." 2 Rev. St. (1st Ed.) pt. 3, c. 7, tit. 5, § 1. This was certainly broad and comprehensive enough to include all cases. It was limited, however, to amendments before judgment, and the codifiers evidently meant to make it more comprehensive, so as to embrace, also, all cases after judgment. * * * Under either the Revised Statutes or the code, there is no doubt in my mind of the power of the court to allow an amendment setting up a new or different defense at any time before trial, if it be in furtherance of justice. * * * In the present case, the defendant's attorney swears that he had supposed that under his general denial he would be able to set up as a defense that the plaintiff had forfeited the policy by

the breach of the covenant respecting additional insurance, but that he is now advised by counsel that that is very doubtful, and that, to put it beyond question, it is safer to set up that defense specifically in the answer. It is upon this ground that an amendment of the answer is asked for. The application is a reasonable one, and ought to be granted. It will involve the service of a new answer, and, as the plaintiff has already been put to great delay in the time consumed in the examination of witnesses out of the state upon commissions, it will have to be upon the payment of such costs as may have accrued since the former answer was put in.

Motion granted.

NEWALL v. HUSSEY.

(Supreme Judicial Court of Maine, 1841. 18 Me. 249, 36 Am. Dec. 717.)

Exceptions from the Middle District Court, Redington, J., presiding.

The declaration was only on an account annexed to the writ. After the action had been entered in court, and continued several terms, the plaintiff offered as amendments, under a general leave to amend entered at the first term: 1. The money counts. 2. Insimul computassent. 3. A count on a note given by the defendant to the plaintiff, or his order payable on demand, with interest, dated August 22, 1838. The defendant resisted the proposed amendments, and objected to the introduction of the note. It was admitted, that the note was given in settlement of the account in suit. Redington, J., allowed the plaintiff to file a count for money had and received, and one upon the note. To this the defendant excepted.

SHEPLEY, J. By the law of this state, a debt due on account is considered as paid and the contract extinguished by taking a negotiable promissory note for the amount. While the common law regards it only as security for an existing debt, the note is here evidence of a new and different contract unless the contrary is made to appear.

The letter of the defendant, under date of November 21st, does admit that the note originated from the account sued; it does not, however, rebut, but rather confirms, the presumption of law that it was received in discharge of the previous contract.

If the original contract no longer existed after taking the note, it would seem to follow that the note must be a new cause of action. And so it has been decided to be in Massachusetts where the like rule of law prevails. Vancleef v. Therasson, 3 Pick. (Mass.) 12.

In our practice amendments are not permitted to introduce a new cause of action. It is within the discretion of the judge of the District Court to permit amendments in all cases where by law the writ or declaration is amendable; and this court does not revise that exercise

of discretion. But if an amendment be permitted which the law does not authorize, the party has a right to except.

This amendment must be regarded as unauthorized, because it introduces a new cause of action.

Exceptions sustained and plaintiff nonsuited.[15]

NEUBECK v. LYNCH.

(Court of Appeals of District of Columbia, 1911. 37 App. D. C. 576, 37 L. R. A. [N. S.] 813.)

The court in the opinion stated the facts as follows:

This is an action for the recovery of damages for the alleged negligent killing of one William Moore on February 13, 1909. The action is brought by Francis L. Neubeck, the administrator of the estate of the deceased, William Moore. The declaration is in two counts, charging, in substance, that the death of Moore was caused by the discharge of a loaded pistol negligently handled by defendant, Patrick J. Lynch, and concluding, "to the damage of plaintiff in the sum of $10,000." On March 9, 1911, plaintiff, by leave of court, amended the declaration by inserting in the proper connection the following: "Plaintiff's decedent left surviving him a widow and four minor children, whose sole support he was, and by his death as aforesaid they were damaged in the sum of $10,000; wherefore plaintiff brings this suit under sections 1301 and 1302 of the Code of the District of Columbia (31 Stat. 1394, c. 854), and demands judgment," etc.

To the amended declaration defendant entered pleas of not guilty and of the bar of the statute of limitations. Plaintiff demurred to the plea of limitations. The court overruled the demurrer, and, plaintiff electing to stand upon the demurrer, judgment was entered for defendant.

Van Orsdel, J., delivered the opinion of the court: This is a statutory proceeding. In an action for damages for negligently causing the death of a person, the statute provides that the action shall be brought "in the name of the personal representative of such deceased person, and within one year after the death of the party injured"; that "such damages shall be assessed with reference to the injury resulting from such act, neglect, or default causing such death, to the widow

[15] Givens v. Wheeler, 5 Colo. 598 (1881); Willoughby v. Atkinson Furnishing Co., 93 Me. 185, 44 Atl. 612 (1899); Silver v. Jordan, 139 Mass. 280, 1 N. E. 280 (1885); Angell v. Pruyn, 126 Mich. 16, 85 N. W. 258 (1901); People v. Judges, 1 Dougl. (Mich.) 434, 442–447 (1844: one reason); Pearson v. Smith, 54 N. H. 65 (1873); Tatham v. Ramey, 82 Pa. 130 (1876); Thayer v. Farrell, 11 R. I. 305 (1876); Brodek & Co. v. Hirschfield, 57 Vt. 12 (1885); Snyder v. Harper, 24 W. Va. 206 (1884). Accord. Smith v. Barker, 3 Day (Conn.) 312, Fed. Cas. No. 13,013 (1809); Philadelphia, etc., Co. v. Gatta, 4 Boyce (Del.) 38, 85 Atl. 721, 47 L. R. A. (N. S.) 932 (1913); Chicago, etc., Co. v. Stein, 75 Ill. 41 (1874); Adams Oil Co. v. Christmas, 101 Ky. 564, 41 S. W. 545 (1897). Contra.

and next of kin of such deceased person;" and that "the damages recovered in such action shall not be appropriated to the payment of the debts or liabilities of such deceased person, but shall inure to the benefit of his or her family, and be distributed according to the provisions of the statute of distribution in force in the said District of Columbia." D. C. Code, §§ 1301–1303.

The original declaration is assailed on the ground that it failed to state a cause of action, because the beneficiaries were not named. It is conceded that the defect was cured by the amendment, but, as the amendment was not filed within the one year allowed for the bringing of the action, it came too late. Therefore, the sole question presented is whether the amendment stated a new cause of action? If the amendment simply related back to and cured the cause of action defectively stated in the original declaration, the bar of the statute cannot be invoked as a defense.

The primary cause of action consists in the charge that appellee negligently killed appellant's intestate in the manner described in the original petition. The allegation of the existence of beneficiaries within the statute is undoubtedly essential to the right of recovery, and, as generally held by the courts, a verdict will not support a judgment or be sustained in its absence. But neither the cause of action nor the jurisdiction of the court depends entirely upon the naming of the beneficiaries. Without them the cause of action is at most defectively stated. That jurisdiction existed was sufficiently shown in the original petition.

Closely analogous to the case at bar are a number of federal cases construing the bankruptcy act, which provides that the person whom it is sought to have adjudged an involuntary bankrupt must not be "a wage-earner or a person engaged chiefly in farming or the tillage of the soil." Act July 1, 1898, c. 541, § 4, 30 Stat. 547 (U. S. Comp. Stat. 1913, § 9588). Also those construing the provision that requires as a condition precedent to the right of the petitioner to file his petition an averment setting forth the number of creditors. 30 Stat. 561, c. 541; Re Pilger (D. C.) 118 Fed. 206; Re Bellah (D. C.) 116 Fed. 69; Beach v. Macon Grocery Co., 57 C. C. A. 150, 120 Fed. 736; Re Brett (D. C.) 130 Fed. 981; Re Mero (D. C.) 128 Fed. 630; Re Plymouth Cordage Co., 68 C. C. A. 434, 135 Fed. 1000; Re Broadway Savings Trust Co., 81 C. C. A. 58, 152 Fed. 152; Re Haff, 68 C. C. A. 646, 136 Fed. 78; First State Bank v. Haswell, 98 C. C. A. 217, 174 Fed. 209.

The general rule, as repeatedly stated by the federal courts, is "that an amendment to a petition which sets up no new cause of action, * * * but merely amplifies and gives greater precision to the allegations in support of the cause of action * * * originally presented, relates back to the commencement of the action." Crotty v. Chicago, G. W. R. Co., 95 C. C. A. 91, 169 Fed. 593, and cases cited. In First State Bank v. Haswell, 98 C. C. A. 217, 174 Fed. 209, the court, referring to this rule, said: "This rule is also applicable to cas-

es where jurisdictional facts which existed at the time the original petition was filed are subsequently made to appear for the first time by an amendment." In Ryan v. Hendricks, 92 C. C. A. 78, 166 Fed. 94, the court, applying the rule to a bankruptcy case, said: "The amendments related to the number of the petitioning creditors and the amount and nature of their claims, and to the occupation of the debtor. There is no doubt that at the time the original petition was filed Longerman was a bankrupt, and all the conditions existed which made it proper for his estate to be administered under the bankruptcy law. If the original petition failed to set forth these conditions fully and clearly, the court did right in allowing the amendments, and the amendments, when made, related back to the time of the filing of the original petition, and had the same effect as if originally incorporated therein." Where large property rights are liable to be involved in the priority of liens and the rights of judgment creditors attaching within four months of the commencement of the bankruptcy proceedings, it might be assumed that a strict rule of pleading would be invoked; but on the contrary a very liberal and sensible rule has been adopted.

Conceding, as we must, that the averment setting forth the beneficiaries is one of the ingredients necessary to state a cause of action in a suit for the wrongful and negligent killing of a person, it is, nevertheless, but one of the elements, and does not, of itself, constitute the cause of action or a separate cause of action. The averment is essential, together with other allegations of the petition, to state a proper cause of action. Its omission merely results in stating a defective cause of action, which may be cured by an amendment, which will relate back in point of time to the filing of the original petition. Love v. Southern R. Co., 108 Tenn. 104, 65 S. W. 475, 55 L. R. A. 471; Geroux's Adm'r v. Graves, 62 Vt. 280, 19 Atl. 987; Burlington & M. R. Co. v. Crockett, 17 Neb. 570, 24 N. W. 219; Walker v. Lake Shore & M. S. R. Co., 104 Mich. 606, 62 N. W. 1032.

Counsel for appellee has cited many cases where it has been held that a petition which does not name the beneficiaries in an action based upon a statute similar to ours is so defective that it will not support a verdict; but that does not argue that the defect may not be cured by amendment before verdict and judgment. On the other hand, the courts of a number of states whose decisions are entitled to the highest respect support appellee's contention that a petition so amended states a new cause of action. The question is one involved in difficulty, but we are constrained to adopt the liberal rule. Indeed, this court has established a liberal rule as to the right of amendment, in order that the ends of justice may be attained. Steven v. Saunders, 34 App. D. C. 321.

In District of Columbia v. Frazer, 21 App. D. C. 154, an amended declaration was filed after the bar of the statute of limitations had run, dismissing a codefendant, omitting acts of negligence originally alleged, and charging new and different acts of negligence. The court,

sustaining the right of amendment, said: "Where, as in this case, there has been a substitution of the original declaration by an amendment, the test is whether the cause of action remains the same in substance, notwithstanding differences of specification. Howard v. Chesapeake & O. R. Co., 11 App. D. C. 330, 336; Texas & P. R. Co. v. Cox, 145 U. S. 593, 604, 12 Sup. Ct. 905, 36 L. Ed. 829, 833. Applying this test, we are of opinion that there was no error in overruling the plea of limitation. The foundation of the action in both pleadings is the negligence of the defendant in the performance of its duty to keep its sidewalks in a safe condition." So here the foundation of the action in both the original and amended petitions is the negligent shooting of appellant's intestate by the appellee.

In the recent case of Texas & N. O. R. Co. v. Miller, 221 U. S. 408, 31 Sup. Ct. 534, 55 L. Ed. 789, suit was brought in Texas to recover damages for a death caused by the alleged negligence of the railroad company in Louisiana. The Louisiana statute, like ours, required the action to be brought within one year. The courts of Texas, under the prevailing rule in the state, refuse to take judicial cognizance of the statutes of other states, unless pleaded. The petition was filed within the year, but failed to set out the Louisiana statute under which the suit was brought. After the year had expired the defendant company answered, setting up the statute. The Texas court held that the answer cured the defect in the petition, which holding was affirmed by the Supreme Court. If a defect so vital as the failure to plead a statute upon which the cause of action is based could be cured by answer, it must follow logically that it could have been cured by amendment. There the statute of Louisiana was required to be pleaded as a condition precedent to recovery. Here the beneficiaries under the statute must be named in the declaration as a condition of recovery.

The original judiciary act, Act Sept. 20, 1789, c. 20, § 32, 1 Stat. 91, (U. S. Comp. St. 1913, § 1591), provides that no proceeding in civil cases in any court of the United States "shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect or want of form, except those which, in cases of demurrer, the party demurring specially sets down together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe." From this it will be observed that in the establishment of the federal courts a most liberal rule of pleading was enjoined by statute. It should not be the policy of the courts to defeat justice by indulging in mere technicalities and fine-spun theories of pleading. Where an amendment does not operate totally to confer jurisdiction, or to change the cause of action or shift the right

of action, but merely supplies an additional element essential to a proper statement of a cause of action defectively stated, or an additional jurisdictional averment essential to clothe the court with complete power to conduct the suit to a legal conclusion, it should be allowed.

The judgment is reversed, with costs, and remanded for further proceedings.

Reversed.[16]

COXE v. TILGHMAN.

(Supreme Court of Pennsylvania, 1835. 1 Whart. 282.)

SERGEANT, J.[17] It was settled soon after the passing of the act of the 21st of March, 1806, that the plaintiff is entitled to amend his declaration or add a new count at any time before or during the trial of the cause, provided he do not introduce a new cause of action. But what amendment does introduce a new cause of action has given rise to frequent controversies; and in many instances the amendment has been refused as not coming within the limit prescribed. An examination of the decided cases will show that in actions ex contractu, so long as the plaintiff adheres to the original instrument or contract on which the declaration is founded, an alteration of the grounds of recovery on that instrument or contract, or of the modes in which the defendant has violated it, is not an alteration of the cause of action. In an action on a policy of insurance, when the plaintiff declared on losses by capture by an enemy and perils of the sea, the court permitted an amendment by adding a count for a loss by barratry. The object of the action, says Tilghman, C. J., was to recover for a loss covered by the policy, and this amendment did not go out of the policy. Anon. cited by Tilghman, C. J., in Rodrigue v. Curcier, 15 Serg. & R. 83. So in Cassell v. Cooke, 8 Serg. & R. 268, 11 Am. Dec. 610,

[16] The great weight of authority is in accord with this case. See cases collected in 3 L. R. A. (N. S.) 297–304; 33 L. R. A. (N. S.) 196; 47 L. R. A. (N. S.) 932.

"The rule is established in this state that the statute of limitations expiring after the commencement of an action bars recovery upon an amended pleading afterwards put in, where the original pleading fails to state a cause of action; or, stated in other words, the rule is that, when a plaintiff in his original declaration filed before the statute of limitations has run against his cause of action fails to aver any cause of action whatever, and afterwards, when the statute has run, files an amended declaration with new and additional counts which do set up a cause of action, such new counts must be held to state a new cause of action—one never before stated and one that is barred by the statute." Vickers, J., in Bahr v. National, etc., Co., 234 Ill. 101, 103, 84 N. E. 717 (1908). But even though a declaration may be demurrable, if it defectively states a good cause of action, it may be amended, and the amendment will not be subject to the bar of the statute. Salmon v. Libby, 219 Ill. 421, 76 N. E. 573 (1905).

[17] The statement of facts is omitted.

in debt, the declaration stated an agreement of the 10th of August, 1813, that Cooke should sell to Cassell an estate, for which Cassell covenanted to pay $325 per acre, viz. one-third on the 10th of April, 1814, one-third on the 10th of April, 1815, and one-third on the 10th of April, 1816, without interest. Cook covenanted to deliver to Cassell a good and sufficient deed on the 10th of April, 1814, when Cassell was to give his bond for the remaining two-thirds, with security, if required. Possession was to be given to Cooke on the 10th of April, 1814, and the parties were bound in a penalty of $100,000. Averments of performance by plaintiff. After the jury were sworn and some progress made in the trial, the plaintiff requested leave to add a new count, setting forth that the deed was not executed on the 10th of April, 1814, at the defendant's request, in consequence of his inability to comply with his covenants; that it was understood the articles remained in force, and the defendant paid various sums to the plaintiff in part performance; that on the 13th of January, 1816, a good and sufficient deed was executed, which the plaintiff tendered to the defendant on or about the 31st of January, 1816. This was objected to by the defendant, but admitted, and on error brought was held to be right. "It was," says Mr. Justice Duncan, "the assignment of a breach of the same covenant, on the same instrument, to be covered by the same penalty." So in Shannon v. Commonwealth, 8 Serg. & R. 444, it was held that in an action on a sheriff's bond, the plaintiff might amend his declaration by assigning new breaches of the condition of the bond. "The new breach," says C. J. Tilghman, "related to the neglect or non-performance of Shannon's duty as sheriff." And in that case the Chief Justice states the very point now in question to have been already decided, for he says, "It has been determined that, under our act of assembly, the court may permit the plaintiff in an action of covenant, to assign new breaches."

In Cunningham v. Day, 2 Serg. & R. 1, the declaration was in indebitatus assumpsit for money had and received. It appeared on the trial that the plaintiff gave the defendant a mare and $25 in exchange for a horse. The horse turned out to have been stolen, and the plaintiff was obliged to give him up to the owner. The defendant had sold the mare for a tract of land and $25. The court holding that the plaintiff could only recover the $50 received by the defendant without interest, the plaintiff had leave to amend by a new count founded on the special contract. This on error was held right, and Tilghman, C. J., says: "This was no change of the cause of action. The plaintiff had been mistaken in the form of his declaration, but it was the injury from the stolen horse for which he sought redress." So where the plaintiff declared in assumpsit for breach of promise to convey land, it was held he might amend by setting forth again the breach of contract, blended with complaints of fraud. Cavene v. McMichael, 8 Serg. & R. 441. In Rodrigue v. Curcier, 15 Serg. & R. 81, the wrong

complained of by the plaintiff, and for which he sought redress, was the defendant's misconduct as his agent in the sale of certain cottons consigned to him. This misconduct was set forth in various forms by the original declaration, and the plaintiff asked leave to add several other forms tending to the same point. The substance of the same complaints was preserved in all those forms; that the plaintiff had been injured by the defendant's mismanagement in the business committed to him; and the amendment was allowed. In Gratz v. Phillips, 1 Bin. 588, the writ and narr. in account render stated the defendant as bailiff and receiver of A. A new count was permitted, describing the plaintiff as surviving partner, and his interest as having been held jointly with a certain B., deceased. On the other hand, where a new instrument or contract is introduced as a ground of action, the amendment is not permitted. Thus in Farmers' Bank v. Israel, 6 Serg. & R. 294, the suit was against the defendant as indorser of two promissory notes. It appeared on the trial that the notes were not due; and it was held that an amendment introducing five other notes entirely different was not admissible. So in Newlin v. Palmer, 11 Serg. & R. 98, the plaintiffs declared on a demise by them to the defendant of a gristmill and tract of land, from the 1st of April, 1814, for one year, at the rent of $375. Afterwards, by leave of court, they filed an additional count, alleging that the defendant after the expiration of the last mentioned term, viz. from the 1st of April, 1815, continued to occupy the demised premises as tenant to the plaintiffs until the 1st of April, 1816, whereby he became liable to pay an additional $375. "Here," says Mr. Justice Duncan, "the matter was entirely new, it was a continuation of possession for another year by the permission and sufferance of the plaintiffs. The first declaration gave the defendant no notice of preparation for the second year; as well might the plaintiff have added a new count on a bond;" and the judgment was reversed. In Canal Company v. Parker, 4 Yeates, 363, the declaration having laid that the defendant was indebted to the plaintiffs for subscription to a canal company with interest; a new count was refused, which demanded the penalty of five per cent. per month, under the act incorporating the company. In Diehl v. McGlue, 2 Rawle, 337, the plaintiff's declaration in assumpsit contained counts for goods sold and delivered with a quantum valebant, work and labor with a quantum meruit, money had and received, money paid and expended. On the trial the plaintiff, to introduce evidence inadmissible under the counts as they stood, offered an additional count, stating a special agreement and promise by the defendant to find the plaintiff constant employment at coach or carriage trimming at a certain rate according to the kind of work, for such length of time as should be mutually agreed on, and breach thereof, which the court below received. This court, on error, held that it was improperly admitted, because it introduced a new cause of action.

In actions ex delicto, the rule is the same. The foundation of the complaint laid in the declaration must be adhered to, although the modes of stating that complaint may be varied by an amendment.[18] Thus in Clymer v. Thomas, 7 Serg. & R. 178, in trespass, the declaration stated the act to have been committed in the township of Beaver, in the county of Union. The plaintiff was allowed to amend the declaration after the jury sworn, by inserting the name of Centre township instead of Beaver to correspond with the fact. The substance of the plaintiff's case, says Tilghman, C. J., was a trespass committed by the defendants by cutting timber on the plaintiff's land in Union county. So in slander, where the words in themselves are not actionable, but are laid as spoken of the plaintiff's trade or calling, the trade may be amended. Rodrigue v. Curcier, 15 Serg. & R. 83. But in trover for an instrument under seal, an amendment is not allowable by introducing a count for another and different instrument not under seal, constituting a simple contract. Tryon v. Miller, 11 Whart. 11. To the same effect is the case of Keasby v. Donaldson, 2 Bro. 103, that in trover leave will not be granted to add other articles. And the plaintiff, having declared for slander, shall not introduce trover or malicious prosecution, or libel. Shock v. McChesney, 4 Yeates, 507, 2 Am. Dec. 415.

The effect of the act of assembly, says Mr. Justice Gibson, is to

[18] "If the plaintiff has two causes of action of the same class, though the same facts may, in part be common to both of them, he is not allowed to declare upon one and afterwards abandon it and substitute the other by amendment. * * * He may, however, add further facts to more fully describe the cause of action,—the wrong—which he originally alleged. He may allege additional facts to show the existence of his primary right, as long as he does not undertake to set up another and distinct right. And he may allege additional facts to show that the defendant has been guilty of the alleged violation of plaintiff's right. If there is substantial identity of wrong (which necessarily includes identity of the right violated), there is substantial identity of cause of action. This identity is not the same as that required between allegata and probata. A party is required to prove his material and essential allegations as he has alleged them, and, in the absence of amendment, may fail because of a variance, though the facts proved show substantially the same cause of action shown by the facts alleged. The two sets of facts may show substantially the same cause of action, and yet the proof of one will not sustain the allegation of the other. Not so with the test of an amendment. To avoid a variance is not the least important of the offices of an amendment. Davis v. Hill, 41 N. H. 329 (1860). So long as the facts added by the amendment, however different they may be from those alleged in the original petition, show substantially the same wrong in respect to the same transaction, the amendment is not objectionable as adding a new and distinct cause of action." Simmons, C. J., in City v. Anglin, 120 Ga. 785, 793, 48 S. E. 318 (1904).

"The great weight of authority is to the effect that the allowance of an amendment to a declaration setting forth an additional ground of negligence as the cause of the same injury does not amount to the statement of a new cause of action." Johnson, J., in Chobanian v. Washburn Wire Co., 33 R. I. 289, 304, 80 Atl. 394, Ann. Cas. 1913D, 730 (1911). See, also, 1 Encyc. Pl. & Pr. 563, 564; 31 Cyc. 416, note 40, Ann. Cas. 1913D, 742. For a few cases contra, including cases from Illinois and Pennsylvania, see Ann. Cas. 1913D, 745.

authorize the courts to allow amendments, after swearing the jury, as fully as they could do at common law before that period, and also to enable a judge at nisi prius to grant amendments, when the cause is about to be tried, which formerly could only be permitted in bank. Farmers' & Mechanics' Bank v. Israel, 6 Serg. & R. 294; Wilson v. Hamilton, 4 Serg. & R. 240. At common law the rule was that, after the end of the second term, the plaintiff was allowed to add a new count, or amend his declaration, only where the cause of action was substantially the same, but not for a different right of action. 2 Tidd's Prac. 754. The reason of this rule was that the plaintiff was obliged to declare within two terms, and a new right of action was considered as a new declaration. But amendments in form or in substance, not varying the cause of action, could be made at any time, whilst the pleadings were in paper, and before they were entered of record. Id. Our act carries this right of amendment down to the very period of trial itself; and the construction has uniformly been that, while it never intended to permit the plaintiff to change the cause of action, yet any amendment short of that was within the letter and spirit of the act, whether in matter of form, or in matter of substance affecting the merits of the case.

In the present case the action was covenant on an agreement under seal, dated the 25th of July, 1806, between Edward Tilghman and Tench Coxe, by which the former covenanted to purchase certain lands of the latter.

The original declaration contained four counts; and two additional counts were afterwards filed. All these set out in various forms a breach of one part of the agreement. The defendants craved oyer; and the agreement being set out, they put in ten pleas, to which the plaintiff replied or demurred. The plaintiff's motion now is for leave to file ten new counts; the defendant's objections are that the 1st, 2d, 3rd, 4th, 5th, and 6th contain assignments of breaches similar to those in the former counts, except that the 1st count avers that Tench Coxe was always ready to convey or cause to be conveyed—and that his executors after his death offered to cause the said lands to be conveyed to the executors or heirs of E. Tilghman. The 7th, 8th, 9th and 10th counts of the new declaration are said to contain a new cause of action, because they set out a breach of another part of the agreement not alluded to at all in the old counts, namely, of covenant by E. Tilghman, that Dr. Adam Kuhn would pay T. Coxe 25 cents per acre, for certain share of the lands, and also that the assignees of Joseph Thomas would pay the like sum for another share.

It is manifest from the principles already stated that these amendments are allowable. The change in the first count is but another mode of alleging performance by the plaintiffs. The 7th, 8th, 9th and 10th assign new breaches, but the plaintiff adheres to the same instrument on which the former declaration was founded. No other agree-

ment is suggested or pretended; and it is set out at length by the plaintiff on the prayer of oyer made by the defendants.

Leave granted to file the ten new counts.[19]

ALLEN v. TUSCARORA VALLEY R. CO.

(Supreme Court of Pennsylvania. 1910. 229 Pa. 97, 78 Atl. 34, 30 L. R. A. [N. S.] 1096, 140 Am. St. Rep. 714.)

MESTREZAT, J. This was an action of trespass at common law brought July 1, 1904, by the plaintiff, a brakeman in the employ of the defendant company, to recover damages for injuries received in its service while he was in the act of coupling cars. The statement was filed with the præcipe, and averred, inter alia, as follows: "It then and there was the duty of defendant corporation to adopt and use couplings for its cars of ordinary character and reasonable safety, according to the usages, habits, and ordinary risks of the business, but the defendant corporation, not regarding its duty in the premises, at or about February 29, 1904, at Juniata county aforesaid, carelessly and negligently adopted and used the pin and link coupler, a kind of coupler not then in ordinary use, but more dangerous than the usual and ordinary coupling employed by railroads, by reason whereof plaintiff, while engaged in coupling cars, so as aforesaid supplied and fitted with the pin and link coupler due to the negligence of defendant corporation, in the lawful performance of his work and exercising due and proper care, on or about February 29, 1904, aforesaid at the county of Juniata, was caught by the left hand between the two protruding irons, called 'bull noses,' parts of the couplings, and thereby his left hand was badly cut, bruised, lacerated, and torn," etc.

In December, 1908, a rule was granted on the defendant to show cause why the statement should not be amended, and on January 21, 1909, the rule was made absolute and the statement was amended so as to read, inter alia, as follows: "That said defendant corporation at the time of committing the grievances hereinafter mentioned was engaged in interstate commerce by railroad and a common carrier, and did haul on its line cars used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars, none of its cars being so equipped with couplers as aforesaid, in violation of Act Cong. March 2, 1893, c. 196, § 2, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), and its supplements; that the train aforesaid was not composed of four wheel cars or eight wheel standard

[19] Spencer v. Howe, 26 Conn. 200 (1857); Clark v. Swift, 3 Metc. (Mass.) 390, 395 (1841); Heath v. Whidden, 24 Me. 383 (1844); Wilson v. Widenham, 51 Me. 566 (1863); Strang v. Branch, Circuit Judge, 108 Mich. 229, 65 N. W. 969 (1896); Harris v. Wadsworth, 3 Johns. (N. Y.) 257 (1808); Boyd v. Bartlett, 36 Vt. 9 (1863). Accord.

logging cars where the height of such cars from top of same to center of coupling does not exceed 25 inches used exclusively for the transportation of logs."

The defendant objected to the allowance of the amendment on the ground that it introduced a new and different cause of action which was barred by the statute of limitations. The first assignment alleges error in making the rule absolute and permitting the plaintiff to amend the statement of claim. As we are of opinion that this assignment must be sustained, the other assignments become immaterial and need not be considered or determined.

The amendment to the statement of claim, allowed by the court, brought the case within the act of Congress of March 2, 1893, and alleges that the cars were equipped with couplers in violation of the act. This statute was enacted, as its title declares, to promote the safety of employés and travelers upon railroads engaged in interstate commerce by compelling common carriers to equip their cars with automatic couplers, etc., and makes it unlawful for a common carrier to haul or permit to be hauled any car used in moving interstate traffic not equipped with couplers coupling automatically by impact. Section 8 of the act provides: "That any employé of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

The original statement, as observed, was at common law, and alleges that the plaintiff's injuries resulted from the defendant company having carelessly and negligently adopted and used the pin and link coupler, more dangerous than the usual and ordinary coupling employed by railroads. Prior to the act of Congress, employés of common carriers assumed the risks and dangers naturally and ordinarily incident to their employment which included the risks and hazards arising from the performance of their duty in coupling cars. If the employé was injured in the discharge of that duty, and it was a risk which he assumed, the carrier was not responsible. But the act changes the liability of the carrier when engaged in interstate commerce, and what was lawful at common law before the passage of the act is made unlawful by the act. The statute abrogates the common law pro tanto, and imposes a liability on the carrier different from that imposed by the common law. The latter gives the employé a right of action for an injury resulting from a negligent act exposing him to a danger which he did not assume in entering the carrier's service; but the statute deprives the carrier of the protection and defense of the risk assumed by the employé, which it had at common law. The act of the carrier in failing to equip its cars with automatic couplers is declared to be unlawful, and is forbidden under the penalty, imposed by section

8, that the employé if injured shall not be deemed to have assumed the risk of his employment. The act of Congress is the basis of the plaintiff's claim, as laid in the amended statement; while, in the original statement, the basis of the claim is the failure of the carrier to perform its common-law duty to him as its employé. The amendment is not a restatement or the statement, in a different form, of the same cause of action, but the averment of a statutory cause of action in which the liability is different and greater than in an action at common law. It deprives the defendant of a valuable right, viz., the defense of the assumption of risk by the plaintiff, which is not permissible. Kaul v. Lawrence, 73 Pa. 410. We think it clear that the amendment to the statement of claim introduced a new and different cause of action, which was barred by the statute of limitations, and therefore, under the well-settled rule in this state, it should not have been allowed.

In support of the contention that the amendment did not change the cause of action, the learned counsel for the plaintiff claims that the language of the original statement was not changed in any way by the amendment which, it is alleged, consisted simply of an addition to the original statement and directed attention to the act of Congress and its supplement as being applicable to the facts of the case. But, it will be observed, in the amendment there was a departure, not only from the facts as laid in the original statement, but also from the law as applicable to the facts in the original statement. In other words, there was a departure, not only from fact to fact, but from law to law. A departure in pleading may be either in the substance of the action or defense, or the law on which it is founded. 2 Saunders on Pleading and Evidence, *807. The original statement, it is true, averred the injuries of the plaintiff and the alleged negligent act of the defendant by which they were caused, but there was no intimation in the statement that the carrier was engaged in interstate commerce or that the defendant's cars were equipped with couplers in violation of the act of Congress. Proof of the existence of these two additional facts was required to sustain the action as amended, and this is one of the tests in determining whether the amendment introduces a different cause of action. Wabash R. Co. v. Bhymer, 214 Ill. 579, 73 N. E. 879.[20] It

[20] "After a petition has been filed, the plaintiff has no right to amend it so as to add a new and distinct cause of action. The application of this rule has brought confusion into the decisions of this court as to the allowance of amendments, and has also given trouble in other jurisdictions in which the same rule prevails. A number of tests have been suggested for determining whether an amendment adds a new cause of action. One general test is said to be 'whether the proposed amendment is a different matter, another subject of controversy, or the same matter more fully or differently laid to meet the possible scope and varying phases of the testimony.' 1 Enc. Pl. & Pr. 564. Other tests, some of them admittedly fallible, have been suggested in different cases, as: (1) Whether the original petition and the amendment would be subject to the same plea (Goddard v. Perkins, 9 N. H. 488 [1838]); (2) whether the same evidence would support both (Scovill v. Glasner, 79 Mo. 449 [1883]); (3) whether the same measure of damages is applicable to both

is apparent that without this amendment the act of Congress could have had no place in the case, and could not have been invoked to deprive the company of its defense that the plaintiff assumed the risks or dangers of his employment. If, however, all the facts necessary to bring the case within the act of Congress had been included in the original statement, it would have been insufficient as a statement under the act without a reference to the statute. Bolton v. Georgia Pacific Ry. Co., 83 Ga. 659, 10 S. E. 352. It is also true that if, as claimed by the plaintiff, all the facts necessary to sustain a recovery on the amended statement were set forth in the original statement, the amendment would still be a change or departure from the original statement, not from fact to fact, but from law to law, from an action founded on the common law to one founded on a statute abrogating the common law, which is equally effective to prevent an allowance of the amendment. In such case the plaintiff bases his right of recovery upon other and different law, instead of other and different facts, and it constitutes a departure from the original cause of action. Union Pacific Ry. Co. v. Wyler, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983; Boston & Maine R. R. Co. v. Hurd, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193.

Our conclusion is supported by numerous decisions in this and other jurisdictions in which the same doctrine has been announced and applied. Dunbar Furnace Co. v. Fairchild, 121 Pa. 563, 571, 15 Atl. 656, 657, was a common-law action of trespass to recover damages for cutting and carrying away timber standing on the plaintiff's land. After the statute of limitations had run, the court allowed the plaintiff to amend his statement so as to permit him to recover treble damages under the act of March 29, 1824, for cutting and converting timber trees. This court reversed the common pleas, and held that the amendment introduced a new cause of action, and should not have been allowed. In the opinion it is said: "It has been many times decided that, in order to recover under that act (of 1824), it is necessary to declare specially upon its terms, and that a common-law action of trespass will not suffice. * * * The difficulty with the present case is that there is not only no conclusion contrary to the form of the statute, etc., but there is no allegation of any other kind that the action is brought under the statute." The case was again in this court (Fairchild v. Dunbar Furnace Co., 128 Pa. 485, 498, 18 Atl. 443, 444), and again it was held that the amendment could not be allowed. In delivering the opinion, Mr. Justice Clark said: "This action of trespass,

(Hurst v. Railway, 84 Mich. 539, 48 N. W. 44 [1891]); (4) whether both could have been pleaded cumulatively in the same count (Richardson v. Fenner, 10 La. Ann. 600 [1855]); (5) whether an adjudication upon one would bar a suit under the other (Davis v. Railroad Co., 110 N. Y. 646, 17 N. E. 733 [1888]). Of these the last mentioned is probably the best and most useful, though even it comes back at last to the question whether the cause of action is the same." Simmons, C. J., in City v. Anglin, 120 Ga. 785, 792, 48 S. E. 318 (1904).

being brought at the common law, was brought to redress the injury done, by an award of compensation; but the action under the statute is not for a redress of the injury. It is to recover a penalty prescribed by the statute, which, as a police regulation, is intended for the protection of real property from waste by those who either negligently or willfully intrude upon the lands of others. The cause of action accruing under this statute, although arising on the same matter, is different from that accruing at common law, and whilst, perhaps, they may be joined in one action, there can be but one recovery. An amendment to a declaration will not be allowed if a new cause of action is thereby introduced."

In Bolton v. Railway Co., 83 Ga. 659, 660, 10 S. E. 352, 353, an action by an employé against the defendant company, it was said, in refusing an amendment to the statement: "If, however, he commences his action and relies upon his common-law right, we do not think he can amend his common-law declaration by setting out the statute and relying upon that for his right to sue and for his recovery. In this case the original declaration was founded upon the common-law right. Nothing was even intimated therein to the effect that he relied upon the statute. According to the decision in Exposition Cotton Mills v. Western & Atlantic R. R. Co., 83 Ga. 441 [10 S. E. 113], and cases cited therein, made at this term, this amendment would have added a new and distinct cause of action." This case also meets the argument of the plaintiff's counsel in the present case that the language of the original statement was not changed by the amendment. The court says (page 661 of 83 Ga., page 353 of 10 S. E.): "But it is argued by counsel for plaintiff in error that all of the facts required by the Alabama statute to be pleaded were already pleaded in the declaration, and that simply to mention the statute in the amendment and recite the same facts therein would not be a new cause of action. While it may be true that all the facts required by the Alabama statute had been set out in the declaration, still those facts alleged in the common-law declaration were mere surplusage and had no legal vitality, and would have been so regarded by the court trying the case. It required the pleading of the statute to give them any vitality at all. As we have seen, that statute is not mentioned or intimated in the original declaration, and hence to have allowed the amendment offered would have been allowing the introduction of a new cause of action."

Union Pacific Ry. Co. v. Wyler, 158 U. S. 285, 295, 15 Sup. Ct. 877, 881, 39 L. Ed. 983, was an action by an employé against a railroad company based upon the common law of master and servant, and was brought to recover damages for an injury which had happened to the plaintiff in Kansas while on duty there. It was held that an amended petition which changes the nature of the claim and bases it upon a statute of Kansas giving the employé in such a case a right of action against the company in derogation of the common law is a departure in

pleading, and sets up a new cause of action. The trial court allowed the amendment, and in reversing the judgment Mr. Justice White, in an exhaustive opinion, discusses the right to amend an original statement in such cases. He says, inter alia: "A suit based upon a cause of action alleged to result from the general law of master and servant was not a suit to enforce an exceptional right given by the law of Kansas. If the charge of incompetency in the first petition was not per se a charge of negligence on the part of the fellow servant, then the averment of negligence apart from incompetency was a departure from fact to fact, and therefore a new cause of action. Be this as it may, as the first petition proceeded under the general law of master and servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas statute, it was a departure from law to law. * * * It is argued, however, that as all the facts necessary to recovery were averred in the original petition, the subsequent amendment set out no new cause of action in alleging the Kansas statute. If the argument were sound, it would only tend to support the proposition that there was no departure or new cause of action from fact to fact, and would not in the least meet the difficulty caused by the departure from law to law. Even though it be conceded that all the facts necessary to give a right to recovery were contained in the original petition, as this predicated the assertion of that right on the general law of master and servant, and not upon the exceptional rule established by the Kansas statute, it was a departure from law to law. The most common, if not the invariable, test of departure in law, as settled by the authorities referred to, is a change from the assertion of a cause of action under the common or general law to a reliance upon a statute giving a particular or exceptional right."

We are all of opinion that the amendment allowed by the court below introduced a new cause of action, barred by the statute of limitations. The first assignment of error must, therefore, be sustained.

The judgment is reversed with a venire facias de novo.[21]

[21] In the following cases an amendment departing from law to law was held to set up a new cause of action: Bradley v. Chicago, etc., Co., 231 Ill. 622, 83 N. E. 424 (1908: from claim by administrator based on common law to claim by parents based on statute, then back to claim by administrator based on common law); Chicago, etc., Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278 (1894: from statutory claim for treble damages to common law); Henderson v. Moweaqua, etc., Co., 145 Ill. App. 637 (1908: from claim for common law negligence to liability under Mines Act); Anderson v. Wetter, 103 Me. 257, 69 Atl. 105, 15 L. R. A. (N. S.) 1003 (1907: from claim for conscious suffering of decedent to action for wrongful death); Church v. Bolyston, etc., Co., 218 Mass. 231, 105 N. E. 883 (1914: similar to Anderson v. Wetter, supra); Fournier v. Detroit United Railway, 157 Mich. 589, 122 N. W. 299 (1909: similar to Anderson v. Wetter, supra); Wingert v. Circuit Judge, 101 Mich. 395, 59 N. W. 662 (1894: from Michigan statute to Canadian statute); Melvin v. Smith, 12 N. H. 462 (1841: from claim for statutory penalty to common-law trespass); Boston, etc., Co. v. Hurd, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193 (1901: similar to Anderson v. Wetter, supra); Des-

KNIGHT v. TRIM.

(Supreme Judicial Court of Maine, 1897. 89 Me. 469, 36 Atl. 912.)

On exceptions by plaintiff.

This was an action on an award, the agreement to submit to arbitration being under seal, and the award of the arbitrators thereon being in writing.

The action was "of the case," in assumpsit.

The plea of defendant was the general issue.

The plaintiff moved to amend the writ from assumpsit to debt.

The presiding justice refused the amendment, and ordered a nonsuit. The plaintiff excepted.

HASKELL, J. Assumpsit upon an award on submission under seal cannot be maintained. Holmes v. Smith, 49 Me. 242. Nor can the form of action be changed by amendment from assumpsit to debt. Flanders v. Cobb, 88 Me. 488, 34 Atl. 277, 51 Am. St. Rep. 410.

Exceptions overruled.[22]

peaux v. Pennsylvania, etc., Co. (C. C.) 133 Fed. 1009 (1904: from statutory claim for discriminatory charges to common-law claim for overcharge); Hall v. Louisville, etc., Co. (C. C.) 157 Fed. 464 (1907: from claim by widow under Florida statute to claim by representative under federal Employers' Liability Act).

The Supreme Court of Alabama has distinctly repudiated departure from law to law as a test of the statement of a new cause of action. Alabama, etc., Co. v. Heald, 154 Ala. 580, 45 South. 686 (1908). The force of Union, etc., Co. v. Wyler, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983 (1895), which is relied upon in the principal case and in the federal cases above cited, is greatly weakened by Missouri, etc., Ry. v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134 (1913). See, also, Seaboard Air Line Ry. v. Koennecke, 239 U. S. 352, 36 Sup. Ct. 126, 60 L. Ed. 324 (1915). In Code states there is some conflict upon this point. See notes 30 L. R. A. (N. S.) 1096, 3 L. R. A. (N. S.) 287.

[22] Mobile, etc., Co. v. McKellar, 59 Ala. 458 (1877: trespass to case); Harris v. Hillman, 26 Ala. 380 (1855: detinue to trover); Flanders v. Cobb, 88 Me. 488, 34 Atl. 277, 51 Am. St. Rep. 410 (1896: assumpsit to case); People v. Circuit Judge, 13 Mich. 206 (1865: trover to assumpsit); Carpenter v. Gookin, 2 Vt. 495, 21 Am. Dec. 566 (1829: assumpsit to trover); Ten Broeck v. Pendleton, Fed. Cas. No. 13,827 (1838: case to debt). Accord.

By a more liberal interpretation of statutes of amendment, or by reason of express statutory authorization of change of form of action by amendment, the opposite result was reached in the following cases: North v. Nichols, 39 Conn. 355 (1872: assumpsit to covenant and debt); Garrity v. Hamburger Co., 136 Ill. 499, 27 N. E. 11 (1891: assumpsit to account); May v. Disconto Gesellschaft, 211 Ill. 310, 71 N. E. 1001 (1904: trover to assumpsit); De Bebian v. Gola, 64 Md. 262, 21 Atl. 275 (1885: assumpsit to debt or covenant), semble; Baltimore, etc., Co. v. McGowan, 16 Md. 47 (1860: covenant to assumpsit); Kirwan v. Raborg, 1 Har. & J. (Md.) 296 (1802: assumpsit to trover); Stebbins v. Lancashire, etc., Co., 59 N. H. 143 (1879: assumpsit to covenant, overruling former cases); Morse v. Glover, 68 N. H. 119, 40 Atl. 396 (1894: case to trespass); Fellows v. Judge, 72 N. H. 466, 57 Atl. 653 (1904: case for deceit to assumpsit); U. S. Watch Co. v. Learned, 36 N. J. Law, 429 (1872: covenant to assumpsit); Price v. New Jersey, etc., Co., 31 N. J. Law, 229 (1865: trespass to case); Carrier v. Dellay, 3 How. Prac. (N. Y.) 173 (1847: trespass to trover); Smith v. Bellows, 77 Pa. 441 (1875: case to assumpsit; but see McNair v. Compton, 35 Pa. 23 (1859), decided prior to statute of 1871; Tyson v. Belmont,

AYER v. GLEASON.

(Supreme Judicial Court of Maine, 1872. 60 Me. 207.)

On report. Trover.

The writ, in the usual form, commanded the officer to summon the defendant to appear and "answer unto James C. Ayer and ———, of," etc., "copartners in trade and doing business under the style and firm name of James C. Ayer & Co.," etc.

At the March term, 1872, the plaintiff asked leave to insert the names of F. K. Ayer, A. G. Cook, and H. Ely, the other members of the firm, which was granted upon terms.

If this amendment was allowable, the case to stand for trial, otherwise plaintiff be nonsuit.

APPLETON, C. J. The defendant was summoned to answer to the suit of "James C. Ayer and ———, of Lowell, in the county of Middlesex and state of Massachusetts, copartners in trade and doing business under the style and firm name of James C. Ayer & Co., said company being established agreeably to law, and now is a legal company." The names of the partners of Ayer were not inserted in the writ. The court, on the plaintiff's motion, permitted the writ to be amended by inserting the names of the several individuals constituting, with said Ayer, the firm of Ayer & Co. To this the defendant excepted.

Exceptions do not lie to the granting or refusing of amendments legally allowable, but when an amendment not authorized by law is permitted, the party aggrieved may except therefor. Newell v. Hussey, 18 Me. 249, 36 Am. Dec. 717.

By the common law, amendments by striking out the names of existing plaintiffs or defendants, or by inserting those of new and additional ones, were not allowable in actions of assumpsit or on contracts.

In a writ of entry, an amendment by striking out the name of one of the demandants was not allowed in Treat v. McMahon, 2 Greenl. 120. In assumpsit against two or more, the plaintiff was not permitted to amend by striking out the name of one of the defendants. Redington v. Farrar, 5 Greenl. (5 Me.) 379. In actions on contract at common law, the names of new plaintiffs or defendants cannot be added by way of amendment.[23] Winslow v. Merrill, 11 Me. 127. In an

Fed. Cas. No. 14,315a (1849: debt to covenant); Billing v. Flight, 6 Taunt. 419 (1816: assumpsit to debt).

[23] "It seems also to be well settled that in actions on contract new plaintiffs or new defendants can never be added by way of amendment, unless by the express consent of parties, though in other actions for torts a defendant may be struck out. Redington v. Farrar & al., 5 Greenl. 379 [1828]. We have no doubt the ruling of the judge was correct in refusing leave to amend, by inserting the name of Andrew Scott as a codefendant. * * *" Mellen, C. J., in Winslow v. Merrill, 11 Me. 127 (1834).

action by husband and wife to recover back usurious interest, the plaintiff was not permitted to amend by striking out the name of the wife. Roach v. Randall, 45 Me. 438.

The common law, so far as it relates to defendants, was changed by statute in 1835 (Laws 1835–36, c. 178, § 4) by inserting or striking out the names of the defendants. R. S. 1871, c. 82, § 11. But this provision has never been held to authorize any amendment of a similar character as to plaintiffs. White v. Curtis, 35 Me. 534. This court cannot legislate, however desirable any particular legislation may be in their judgment, upon the subject-matter of amendments.

In petitions for partition the petition may be amended, in certain cases, by striking out the names of the petitioners and inserting those of others. R. S. 1871, c. 88, § 11.

As the amendment in question was not allowable at the common law, and as the legislature have changed the law of amendments only as to defendants, the common law must be regarded as in force so far as it relates to plaintiffs, and consequently the amendment is not allowable.

Amendments, like the one granted in the present case, have been allowed in some of the states, but their allowance is placed upon special statutory provisions, by which they are authorized. Stuart v. Corning, 32 Conn. 105; Pitkin v. Roby, 43 N. H. 138. In the latter case the court expressly say that "at common law, such amendments could not be made in actions of assumpsit."

Exceptions sustained.[24]

KENT, WALTON, DICKERSON, and BARROWS, JJ., concurred.

BUCKLAND v. GREEN.

(Supreme Judicial Court of Massachusetts, 1882. 133 Mass. 421.)

Contract by "Georgie A. Buckland, administratrix of the estate of J. P. Buckland, late of Holyoke, in said county, deceased," on an account annexed, for services alleged to have been rendered by the plaintiff's intestate. The writ was dated March 30, 1881, and alleged that "this action is brought for the benefit of William G. White, of Chicopee, in said county, the equitable owner of said claim." The answer denied each and every material allegation in the plaintiff's declaration, alleged payment, and contained the following: "And the defendant for further answer says that, prior to the commencement of this action, the plaintiff, as administratrix of said estate, under license granted by the probate court in and for the county of Hampden, duly

[24] The common-law rules as to adding or striking out parties plaintiff or defendant have been very generally changed by statute. See 1 Ency. Pl. & Pr. 535 et seq; 3 Ency. L. & P. 654 et seq.; 31 Cyc. 469 et seq.

sold or assigned the demand or claim against the defendant on which this suit is founded."

In the Superior Court the plaintiff offered the following amendment: "And now comes the plaintiff, and moves to amend the writ in said action by striking out the words: 'Georgie A. Buckland, administratrix of the estate of J. P. Buckland, late of Holyoke, in said county, deceased. This action is brought for the benefit of William G. White, of Chicopee, the equitable owner of said claim'—and inserting the following: 'William G. White, of Chicopee, in said county, the claim for which this action is brought having been sold and assigned by Georgie A. Buckland, administratrix of the estate of J. P. Buckland, by authority and license of the Probate Court, on the 19th day of March, 1881, and purchased by said William G. White.'"

PUTNAM, J., allowed this amendment, against the objection of the defendant.

It was agreed that said claim was duly sold, as alleged, prior to the commencement of this action; and that all the formalities required by the Gen. St. 1860, c. 98, § 4, had been complied with. At the hearing without a jury, the judge found for the plaintiff; and the defendant alleged exceptions.

BY THE COURT. The allowance of the amendment was within the discretion of the Superior Court. Winch v. Hosmer, 122 Mass. 438.

Exceptions overruled.[25]

LEWIS LUMBER CO. v. CAMODY.

(Supreme Court of Alabama, 1902. 137 Ala. 578, 35 South. 126.)

TYSON, J.[26] Although there are a number of errors assigned, but two of them are insisted upon in brief of counsel.

The first of these is predicated upon the action of the court in overruling the defendant's motion to strike the amendment of the complaint, which had been allowed. This amendment consists in striking out of the caption of the complaint the words "a firm composed of B. A. Lewis et al. and B. A. Lewis individually," and inserting in lieu thereof the words, "a corporation organized under the laws of the state of Maine," making the caption as amended read "M. C. Camody vs. The Lewis Lumber Company, a corporation," etc. The ground of the motion insisted upon is that the amendment substitutes a new party defendant. The party sued is the "Lewis Lumber Company," and the words stricken out and those added are merely descriptive. The amendment was permissible. Western Railway of Ala. v. Sistrunk, 85

[25] That under modern statutes and practice, the party beneficially interested may be substituted for the nominal plaintiff, and vice versa, see 1 Ency. Pl. & Pr. 537; 3 Ency. L. & P. 655.

[26] The statement of facts and a portion of the opinion are omitted.

Ala. 352, 5 South. 79; Southern Life Ins. Co. v. Roberts, 60 Ala. 431; Ex parte Nicrosi, 103 Ala. 104, 15 South. 507.

If the contract sued on was not executed by the defendant, but was the contract of some other person or firm doing business under the name of the "Lewis Lumber Company," that was a matter of defense. * * * Affirmed.[27]

WALKER v. LANSING & SUBURBAN TRACTION CO.

(Supreme Court of Michigan, 1906. 144 Mich. 685, 108 N. W. 90.)

Case by Charles H. Walker, administrator of the estate of Minnie M. Walker, deceased, against the Lansing & Suburban Traction Company for the negligent killing of plaintiff's intestate. There was judgment for plaintiff, and defendant brings error. Reversed.

MOORE, J. Mrs. Walker, the wife of plaintiff, was in February, 1905, a passenger on a car belonging to defendant company. It is plaintiff's claim that after descending from the car Mrs. Walker attempted to pass behind the car to reach the opposite side of the street, that without warning the car was backed, striking and severely injuring her, and that on the 17th of May following she died from the effects of said injury. The plaintiff commenced this action to recover damages for the loss of his wife. He recovered a judgment. The case is brought here by writ of error.

The errors assigned may be arranged into groups. It is the claim of defendant that it was not shown it was in any way responsible for the injury, and that a verdict should have been directed in its favor. We shall not attempt to recite the testimony, but there was evidence requiring the case to be submitted to the jury.

The second group of errors relates to the court's permitting an amendment to the declaration. The result of the amendment was to allow the plaintiff to appear in the action, not as an individual, entitled to the damages which he had sustained as the husband of decedent because of her injury and death, but as her personal representative, entitled to very different damages. The effect of the amendment was to permit Mr. Walker as an individual representing one cause of action to get out of court, and Mr. Walker as administrator representing an entirely different cause of action to get into court. This is not permissible. People v. Judges, 1 Doug. 434; People v. Circuit Judge, 13 Mich. 206, and cases cited. Hurst v. Railway, 84 Mich. 539, 48

[27] There are numerous cases applying the same rule. But if the court interprets the amendment as substituting an entirely new defendant, it will usually disallow it. See, for example, Western Railway v. McCall, 89 Ala. 375, 7 South. 650 (1889); Hughes v. Diamond Match Co., 1 Pennewill (Del.) 140, 39 Atl. 772 (1897). See, also, 1 Ency. Pl. & Pr. 540; 3 Ency. L. & P. 660-662.

N. W. 44; Wood v. Insurance Co., 96 Mich. 437, 56 N. W. 8; Angell v. Pruyn, 126 Mich. 16, 85 N. W. 258, and the cases there cited.

Judgment is reversed, and a new trial ordered.[28]

[28] An amendment which changes the character or capacity in which a plaintiff sues is generally allowed under modern statutes. It is generally agreed that, where the amendment has the effect of stating a new cause of action, it will either be disallowed or will be regarded as a new cause of action begun at the date of amendment. The difficulty arises in applying this rule. Different courts sometimes reach opposite conclusions upon the same state of facts. Compare, for example, Fitzhenry v. Consolidated, etc., Co., 63 N. J. Law, 142, 42 Atl. 416 (1899), and Lower v. Segal, 60 N. J. Law, 99, 36 Atl. 777 with Van Doren v. Pennsylvania, etc., Co., 93 Fed. 260, 35 C. C. A. 282 (1897), and Missouri, etc., Co. v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134 (1913). See generally 1 Ency. Pl. & Pr. 545; 3 Ency. L. & P. 657, 668; 31 Cyc. 490; 3 L. R. A. (N. S.) 304.

CHAPTER V

DILATORY OBJECTIONS

SECTION 1.—ANTICIPATING IN DECLARATION

FLANDERS v. ATKINSON.

(Superior Court of Judicature of New Hampshire, 1846. 18 N. H. 167.)

Debt. The defendants were summoned to answer to the plaintiff in a plea of debt that to the plaintiff they render the sum of $110, which it was alleged the town owed to the plaintiff, and unjustly detained from him. There were several counts in the writ for penalties alleged to have been incurred for a neglect to erect and keep guide boards at the intersection of roads in said town; but the writ contained no allegation that the matters alleged were to the damage of the plaintiff in any sum. The defendant moved to quash the writ for this reason; whereupon the plaintiff moved for leave to amend, to which the defendants objected, alleging that the court had no jurisdiction of the action.

WOODS, J. A motion is made to amend the writ by inserting the ad damnum, which has been wholly omitted. This motion is resisted, not upon the ground that that material part of the writ does not come within the general provision of the statute which authorizes the courts to grant amendments, but because there is nothing to show that the court has jurisdiction of the cause. If the court has no jurisdiction, then, by the decision in Hoit v. Molony, 2 N. H. 322, it cannot exercise a discretion in allowing an amendment to be made that would, if it could relate back to the inception of the process, confer jurisdiction; so that the material question is whether the court of common pleas has jurisdiction of the case without the amendment; or, in other words, whether, in actions brought in the court of common pleas after the course of the common law, it is necessary in pleading to give that court jurisdiction.

A general rule on this subject, stated as having been a well settled one and referred to as such in Peacock v. Bell, 1 Saund. 73, is this: "That nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged." [1]

[1] "The rule thus clearly laid down has been recognized and adopted—I had almost said universally—by all courts from that day to this. Wheeler v. Ray-

So Lord Hardwick, in The Earl of Derby v. The Duke of Athol, 1 Ves. 202, in reference to the same rule, uses this language: "But I cannot put this, which is a superior court of general jurisdiction, in whose favor the presumption will be that nothing will be intended to be out of its jurisdiction which is not alleged and shown to be so, upon the level with an inferior court of a limited local jurisdiction, within whose jurisdiction nothing shall be intended to be which is not alleged to be so."

These words are cited by Lord Ellenborough, in The King v. Johnson, 6 East, 600, and numerous cases attest the general acquiescence of the courts in the rule, and in its necessary corollary, or sequel, that in actions in inferior courts it is necessary that every part of that which is necessary to bring them within the jurisdiction must be set out. Rex v. Liverpool, 4 Bur. 2244; The King v. Bagshaw, 7 T. R. 363; Tower v. Wall, 1 do. 151.

It was decided in Peacock v. Bell, which has been cited, that the court of the county palatine of Durham was, so far as to admit the application of the rule laid down, a superior court. For although it is inferior to the King's Bench, yet so also is the common bench; "yet it is an original and superior court, of which the law takes notice; and so is the court of the county palatine."

The same is said of the courts of great sessions, in Wales, county palatine of Chester, and the court of Ely, 1 Saund. 74, note (1).

The jurisdiction of the court of common pleas is defined by Revised Statutes 1842, c. 172, § 3, so far as it is necessary to consider it with reference to the question presented by this case.

"The court of common pleas shall have original jurisdiction of all civil actions in which the proceedings shall be according to the course of the common law, except in cases where justices of the peace have jurisdiction, and where the proceedings must be commenced by writs of which the superior court has exclusive jurisdiction."

By chapter 172, § 1, jurisdiction is given to justices of the peace of "all pleas and actions in which the title to real estate shall not be drawn in question, when the damages demanded do not exceed thirteen dollars and thirty-three cents." And this statute, made in execution of the power conferred by the constitution, to give that jurisdiction to such magistrates, is nearly in the terms of the constitution itself, and seems to exhaust the power it confers.

Now in comparing these two courts, as established by the statutes that have been cited, there is no difficulty in determining that the ju-

mond, 8 Cow. (N. Y.) 311 [1828]; Foot v. Stevens, 17 Wend. [N. Y.] 483 [1837]; Bloom v. Burdick, 1 Hill [N. Y.] 139, 37 Am. Dec. 299 [1841]; Sir Thomas Cooke Winford v. Powell, 2 Lord Raymond's Rep. 1310 [1712]; Mills v. Martin, 19 Johns. [N. Y.] 33 [1821]; Bac. Ab. tit. Courts, D. 3." Trumbull, J., in Kenney v. Greer, 13 Ill. 432, 448, 54 Am. Dec. 439 (1851), referring to the above-quoted excerpt from Peacock v. Bell, 1 Saund. 73 (1649). See, also, 12 Ency. Pl. & Pr. 173, notes 1 and 2, 177, 178, notes 1 and 2; 11 Cyc. 691–697; 31 Cyc. 104, note 32, 105, notes 33 and 34.

risdiction of one is limited to a certain class of actions, and is, in the obvious and ordinary, as well as technical, sense of the term, inferior; while the jurisdiction of the other, conferred in general and very comprehensive terms, embraces all actions in which the proceedings are after the course of the common law that do not fall within the peculiar cognizance of justices of the peace, or of the superior court.

Of this jurisdiction, although in a sense inferior to that of the superior court, with reference to whose general superintendence of all courts in inferior jurisdiction, and other powers enumerated in the statute defining them, all other courts of the state are deemed inferior, it may be said with more significance than was said of the common bench and the courts of the county palatine, in the case last referred to, that "it is an original and superior court."

The broad and residuary terms by which its jurisdiction is described appear to have been designed to create the legal presumption "that nothing shall be intended to be out of it, that is not alleged and shown to be so."

It is not necessary, therefore, in actions in the court of common pleas, to bring the case within the jurisdiction by the declaration; for everything will be intended to belong to it that is not shown to belong to that of another court. Jones v. Winchester, 6 N. H. 497; The King v. Johnson, 6 East, 595.

The present action does not appear to be one of those of which the exclusive original cognizance is with justices of the peace. The sum demanded in damages does not appear not to exceed the limits of that jurisdiction. There is nothing apparent on the face of the writ that gives jurisdiction to any court. It falls, therefore, into the general and residuary jurisdiction of the superior tribunal, and not into the limited and inferior jurisdiction within which nothing is presumed to be, till it is shown.

The case is, therefore, within the jurisdiction of the court in which the action was brought, and the amendment, like other amendments of form or of substance, may, in the discretion of that court, be allowed.

The plaintiff has leave to amend.

BENNINGTON IRON CO. v. RUTHERFORD.

(Supreme Court of New Jersey, 1840. 18 N. J. Law, 158.)

HORNBLOWER, C. J.[2] The causes of demurrer are: First, That it does not appear by the bill, that the plaintiffs are a corporation, or have any legal capacity to sue.

The plaintiffs sue by the name of "the Bennington Iron Company," but do not call themselves a corporate body, nor aver that they are

[2] A portion of the opinion is omitted.

such. There seems to be some conflict in the books on the question whether a corporation must prove themselves to be such, on a plea of the general issue, or whether a defendant, by pleading to the merits, admits their capacity to sue. Mr. Kyd in his treatise on Corporations, vol. 1, pp. 291, 292, seems to be of opinion that a corporation, on the general issue pleaded by the defendant, must prove their corporate existence. It was certainly so held by Lord Chan. King, in Henriques v. The Dutch West India Co., as reported in 2 Ld. Raym. 1535.[3] It has been, I believe, uniformly so held by the Supreme Court of New York. Bank of United States v. Haskins, 1 Johns. Cas. (N. Y.) 132; Jackson v. Plumbe, 8 Johns. (N. Y.) 376; Dutchess Cotton Manufactory v. Davis, 14 Johns. (N. Y.) 238, 7 Am. Dec. 459. In Bank of Auburn v. Weed, 19 Johns. (N. Y.) 300, the question came directly before that court, on a general demurrer to a plea of nul tiel corporation; and though it was admitted to be according to the ancient form of pleading in such cases, yet the court said it was contrary to the principles of good pleading in modern times, since it attempted to put in issue by a special plea in bar a fact, which the plaintiffs were bound to prove in the first instance. The plea was therefore overruled, as amounting only to the general issue. Again, in Bank of Utica v. Smalley et al., 2 Cow. (N. Y.) 770, 14 Am. Dec. 526, it was expressly decided that the plaintiffs must prove themselves to be a corporation, upon a plea of the general issue; and in Wood v. Jefferson County Bank, 9 Cow. (N. Y.) 194, 205, the same rule was adhered to. The defendant in that case pleaded, first, non assumpsit, and, secondly, nul tiel corporation. To this latter plea the plaintiffs replied specially, and issue was joined; but it was held by the court that the plea itself was bad, as amounting only to the general issue, and that the issue joined upon it was immaterial. "It is well settled" the court say, "that a corporation must, upon a plea of the general issue, prove the existence of the corporation." So too it was held in Utica Ins. Co. v. Tilman, 1 Wend. (N. Y.) 555; and I am not aware that the rule has ever been departed from in that state. In England, the same doctrine, so far as I can discover, prevails. In Company of Carpenters, etc., v. Hayward, Dougl. 359, which was an action on the case, the plaintiffs were obliged to prove themselves a corporation; the case as reported does not distinctly state what the plea was, but it seems to have been the general issue. And it is clear that in the case of Mayor,

[3] "The authorities referred to by the plaintiff rest for support principally on the case of Henriques v. Dutch West India Company, 2 Lord Raymond, 1532 (1729); but an examination of that case will show that the point was not decided. * * * It is very certain that the point under discussion did not, and could not, arise in judgment either in the King's Bench, or House of Lords. And this case is no authority in support of the position that the plaintiffs, under the general issue, must prove their corporate character, unless it can be considered that the statements of counsel arguendo, or the loose note of the reporter, as to what Lord King told him took place on the trial in the Common Pleas, can be so considered." Ormond, J., in Prince v. Commercial Bank, 1 Ala. 241, 243, 34 Am. Dec. 773 (1840).

etc., of Linn Regis v. Payne, 10 Co. 120, in which the general issue only was pleaded, the name and existence of the corporation was the principal matter inquired into.

But in Conard v. Atlantic Ins. Co., 1 Pet. 450, 7 L. Ed. 189, Mr. Justice Story says: "By pleading to the merits, the defendant necessarily admitted the capacity of the plaintiffs to sue. If he intended to take the exception, it should have been done by plea in abatement; and his omission to do so was a barrier of this objection." If by a plea in abatement the judge means that kind of dilatory plea which is, strictly speaking, a plea in abatement, as distinguished from pleas to the jurisdiction, and pleas to the disability of the plaintiff (3 Bl. Com. 301; Gould's pl. 229, § 10), then I do not see how the entire incapacity of the plaintiffs to sue at all would be matter for a plea in abatement. Such plea must always give the plaintiff a better writ. Gould's pl. 254, § 67; 3 Bl. Com. 302. If the plaintiffs were not a corporation, they could not sue at all, as such; and the plea could not give them a better writ. If, therefore, a corporation is not bound to prove its existence upon the general issue, I see no way in which a defendant can compel the plaintiffs to such proof but by pleading nul tiel corporation, which, like the plea of no such person in rerum natura, to an action brought by a natural person, is a plea to the disability of the plaintiff. Such pleas are not, correctly speaking, pleas in abatement, for the former pleas, sometimes go to defeat the suit entirely, and sometimes only to suspend it until the disability be removed. Gould's pl. 239, § 31; Id. 250, § 58; Id. 251, § 60. In Mayor, etc., of Stafford v. Bolton, 1 Bos. & Pul. 40, which was an action on the case, the plea was not guilty; on the trial the plaintiffs gave in evidence their charter of incorporation. The defendants objected that there was a variance between the name of the corporation in the charter and that in the declaration; upon which the plaintiffs were nonsuited. But this nonsuit was set aside by Eyre, C. J., and all the Judges, upon the ground that it was a mere misnomer, and that the variance might have been, and therefore ought to have been, pleaded in abatement. So, in Bank of Utica v. Smalley et al., 2 Cow. (N. Y.) 770, 14 Am. Dec. 526, the plaintiffs were incorporated by the name of "The President, Directors and Company" of etc.; but the suit was brought by "The President and Directors" of etc. A majority of the court held that it was a mere misnomer, and ought to have been pleaded in abatement; but Savage, Chief Justice, was of opinion that the variance was fatal on the general issue; and then again, I remember an ejectment, many years ago, tried before Chief Justice Kirkpatrick in the Essex Circuit, on the demise of the Rector Churchwardens and Vestrymen of Trinity Church at Newark. Upon producing the charter it appeared that after the word "Newark" was added, "elected and chosen according to the canons of the church of England, as by law established." The latter words, the Chief Justice held to be part of the corporate name, and nonsuited the plaintiff.

In Burnham v. Strafford Savings Bank, 5 N. H. 446, it was held, by Richardson, C. J., that a misnomer in the case of a corporation must be pleaded in abatement, but that a material and substantial mistake of the name will not warrant any proceedings. It cannot be regarded, in such case, as a suit (by or) against a corporation; and see Briggs v. Nantucket Bank, 5 Mass. 94; Medway Cotton Manufactory v. Adams, 10 Mass. 360; Society for Propagating the Gospel v. Young, 2 N. H. 313; Bullard v. Nantucket Bank, 5 Mass. 101; 2 Stark. Evid. 424.

I have extended my researches and my remarks, on this point (further perhaps than was necessary) because the question has not, so far as I know, been settled in this state whether a corporation plaintiff must prove its existence under the general issue;[4] or whether it can only be compelled to such proof, by a plea of nul tiel corporation. But be this as it may (and on this point I give no opinion), it is now well settled that a foreign corporation, public or private, may maintain a personal action in our courts, and that it is not necessary in any case, whether of a public or private corporation, foreign or domestic, to set out in the declaration, the manner of its creation. Several of the cases already cited establish these positions. In Portsmouth Livery Co. v. Watson et al., 10 Mass. 91, the defendants pleaded, in abatement, that plaintiffs were not incorporated by the legislature of Massachusetts, or under any authority of that state. Upon a general demurrer to that plea, the court said that the principle assumed by the plea had no foundation in any maxim, or in any argument of public convenience or policy; that in many instances, and for many purposes, foreign corporations were recognized, especially those created by the laws of any of the United States; that of the existence of public corporations within the state the court must take judicial notice, as they must of all other public statutes; and as to private corporations of that state, and all foreign corporations, whether public or private, their existence must be proved, by legal evidence, as every other material fact must be proved on an issue to the country. So in the case cited from 1 Johns. Cas. 132, the defendant pleaded, in abatement, that plaintiffs had not set forth any charter or act of incorporation; but it was held to be unnecessary, and the plea was overruled.

But still it is insisted, and such is the doctrine assumed by the demurrer in this case, that the plaintiffs must call themselves a body politic and corporate, or aver themselves to be such. In the forms and books of entries, as well as in our own practice, the precedents are both ways; but since a corporation may sue, without setting forth in the declaration how, when or by what authority they were incorporated, why should it be necessary to aver the fact that they are incor-

[4] This question was settled, in accord with the weight of authority, in Star Brick Co. v. Ridsdale, 36 N. J. Law, 229 (1873), which held that under the general issue a corporation plaintiff need not prove its corporate existence. See further on this point. 5 Ency. Pl. & Pr. 77, 78; 10 Cyc. 1354, notes 3 and 4.

porated at all? Why not sue generally, in their corporate name; since either upon the general issue, or upon a plea of nul tiel corporation, or a plea in abatement, whichever, upon advisement, may be deemed the proper mode of defence, they may be compelled to prove themselves a corporation, by the name in which they have sued? Kyd on Corporations, vol. 1, pp. 191, 192, after saying that a corporation need not show how they were incorporated, adds, "For if the name be proper for a corporation, that argues (indicates) that they are such," thus plainly intimating his opinion, that they need not call or aver themselves to be a corporation.

It is said, however, the words "the Bennington Iron Company" do not import a corporation. It seems to me very immaterial whether they do or not. The plaintiffs have a legal existence and capacity to sue by the name they have used, or they have not; and if the defendant questions their corporate existence or capacity to sue by that name, he may, in one of the ways I have mentioned, compel them to prove by legal and competent evidence, their corporate existence and their name. It would not be difficult to mention some natural persons, whose names as little import that they are such, as that of the plaintiffs in this cause does their existence as a corporation. Yet, in a suit brought by one of those persons, it would not be necessary for him to aver that he was a human being.

In Rees v. C. Bank, 5 Rand. (Va.) 326, 16 Am. Dec. 755, and in Bank of Marietta v. Pindall, 2 Rand. (Va.) 465, as they have been condensed by Wheeler in 3 Amer. Com. Law, 474, it was held that, in a suit by a corporation, it need not be averred in the declaration that they are incorporated and have a right to sue; because the question whether or not they are a corporation may be put in issue by a plea, or inquired into upon the general issue. The same point has been expressly ruled by the Supreme Court of Indiana, in Harris v. Muskingum Manufacturing Company, 4 Blackf. 267, 29 Am. Dec. 372. Upon the authority of these cases, as well as upon the reason of the thing, I am satisfied there is nothing in this exception. * * *

Demurrer overruled.[5]

[5] The great weight of authority at common law is in accord. See 5 Ency. Pl. & Pr. 70–74, and cases cited; 10 Cyc. 1347–1350, and cases cited.

Other matters going to the disability of plaintiff to sue, at common law, were coverture, infancy, outlawry, attainder, excommunication and alienage. When not appearing affirmatively in the declaration, usually the only method of taking advantage of them was by dilatory plea. See Gould, Pleading (Hamilton's Ed.) 238–247.

BURGESS v. ABBOTT.

(Supreme Court of New York, 1841. 1 Hill, 476.)

Error from the superior court of the city of New York. The action below was debt, brought by Abbott and Ely against Burgess. The declaration was on a judgment of the superior court of Cincinnati, Ohio, rendered against Burgess and one Henry Crane; but it did not expressly show whether Crane, at the time of the commencement of the present suit was living or not. The defendant demurred generally, and the plaintiffs joined in demurrer. Judgment having been rendered for the plaintiffs in the court below, the defendant sued out a writ of error.

COWEN, J. It is treated by the books as clear that, when a declaration or other pleading of the plaintiff, in an action against one upon a contract, shews that he is a joint contractor, with another not sued, saying, moreover, in express terms, that the contractor not sued is still living, the defendant shall not be put to his plea in abatement, but may demur,[6] or move in arrest,[7] or maintain error [8] in case of a verdict against him. 1 Chit. Pl. 46 (Am. Ed. of 1840), and the cases there cited. If it do not thus appear in terms that the party omitted is still alive, the question seems to be open whether the nonjoinder must not be pleaded in abatement. A case in the Year Book (28 H. 6. 3, a, pl. 11) and Cabell v. Vaughan (1 Saund. 291, 1 Ventr. 34, s. c., 1 Sid. 420, s. c., nom. Chappel v. Vaughan) are strong cases that it must. Vid. 1 Saund. 291, a, note 2. These cases are considered in 1 Saund. 291, b, note (4), and several subsequent cases cited; and some being of an equivocal character in the report are sought to be reconciled. The learned annotator, himself a very high authority, thinks that the principle governing a plea of nonjoinder in abatement, where you must always aver full life, would seem to demand the same averment on the other side, when the objection is founded upon what appears there. The rule is that you need not plead in abatement a matter with which you are already furnished by the plaintiff's own pleadings. Eyre, C. J., in Scott v. Godwin, 1 Bos. & Pull. 73. But in order to satisfy this rule you must be furnished by him with every material fact. If he do not aver life, therefore, it follows that you must aver it by plea; for in availing yourself of mere abatable matters, great fullness is required; and courts will not, in this respect, help pleaders by intendment. Nonjoinder of a defendant is no more than abatable matter, in whatever form it may appear, and is consid-

[6] Raney v. McRae, 14 Ga. 589, 60 Am. Dec. 660 (1854), semble; Smith v. Miller, 49 N. J. Law, 521, 13 Atl. 39 (1887); Gilman v. Rives, 10 Pet. 298, 9 L. Ed. 432 (1836), semble. Accord.

[7] Belden v. Curtis, 48 Conn. 32 (1880), semble; Raney v. McRae, supra, semble; Gilman v. Rives, supra, semble. Accord.

[8] Raney v. McRae, supra, semble. Accord.

ered rather an ungracious objection, as may be seen by Rice v. Shute, 5 Burr. 2611, 2613. See the case of Horner v. Moor, cited by Aston, J. (Id. 2614), which favors the doctrine in the note to Saunders.

On the other hand we have been referred to several cases of nonjoinder on the side of the plaintiff. In these it is held fatal if he shew nonjoinder simply, even without expressly averring life in the party off the record.[9] But this objection is always received with much less disfavor than a nonjoinder of defendants. The plaintiff knows his associates, whereas he is often ignorant of those on the other side. Hence the ordinary intendment is allowed against him. And the difference between the two cases will be found to have been put upon this ground in Scott v. Godwin, 1 Bos. & Pull. 73, 74, in a very learned opinion of Eyre, C. J.[10] Addison v. Overend, 6 T. R. 766, is the strongest, among that class of cases, in favor of the plaintiff in error.

The King v. Young, 2 Anstr. 448, held the doctrine contended for by the plaintiff in error more directly. The suit was on a recognizance, and McDonald, Chief Baron, lays down the rule that, if the nonjoinder of a defendant appear by the declaration, it is bad, irrespective of any averment of life. But that case went on Blackwell v. Ashton, Aleyn, 21, which qualifies the rule by confining it to scire facias on a record and conceding that full life must appear to have been averred in case of a bond. Whether there be anything in the distinction at this day may be doubted.[11] Lawrence, J., too, in South v. Tanner, 2 Taunt. 256, says, when speaking of the point, that "a person sued as living, is presumed to continue alive"; but the point decided by that case was different, and the remark was made as a reply to counsel in the course of their argument. A case subsequent to that of The King v. Young in the court of exchequer, would seem, however, fully to bear him out; viz., The King v. Chapman, Anstr. 811, which was scire facias on an auctioneer's bond. The Lord Chief Baron said the court could not distinguish it from The King v. Young. The counsel, Marryatt, arguendo, spoke of the contrary rule as being a very idle one, saying, "it is impossible to believe that the fact of the coobligor being alive could appear on the face of the declaration."

In Whitaker v. Young, 2 Cow. 569, it seems to have been taken for granted that the declaration shewed life in the heir not sued, who was stated in the declaration as still refusing with the others to pay the debt. The objection that such an averment had been omitted was not made, and the court cite and approve the rule in an old edition of 1 Chit. Plead., put there with the same qualification as in the last. Other American courts have, however, followed the rule of the Eng-

[9] For many cases accord, see 15 Ency. Pl. & Pr. 564; 1 C. J. 125; 1 Smith's Leading Cas. (8th Am. Ed.) 1414; 1 William's Saund. 154, note 1, 291b, note 4 at 291h, et seq.

[10] See Prunty v. Mitchell, infra, note 18, p. 610.

[11] This distinction is recognized in Gilman v. Rives, 10 Pet. 298, 9 L. Ed. 432 (1836). See, also, Hamilton v. Buxton, 6 Ark. 24 (1845), semble.

lish exchequer, applying it to the nonjoinder of a co-contractor, by bond or simple contract, appearing in the declaration, though not accompanied by the express averment that he is living.[12] Leftwich v. Berkeley, 1 Hen. & M. (Va.) 61; Newell v. Wood, 1 Munf. (Va.) 555; Harwood v. Roberts, 5 Greenl. (Me.) 441. See, also, what was said in Blackwell v. Ashton, Styles, 50; also Osborne v. Crosbern, 1 Sid. 238.

I have not looked into any other cases. Enough have been cited to show their exceeding conflict; but I am inclined to think that the ancient and true rule in England is the one laid down by Williams in his note to Saunders, already noticed. It is in harmony with the nature of the plea of nonjoinder, and with the policy of discouraging dilatory pleas, which seems to have attached directly to abatement for nonjoinder of defendants, whether objected on the declaration or interposed by plea, so early as the Year Book of Hen. 6. The present question, it is true, arises on a demurrer to the first count of a declaration on a judgment rendered in a court of record of the state of Ohio. But, even had it been scire facias on a domestic judgment, it is quite difficult to perceive how the question could be varied by that circumstance, notwithstanding the case of The King v. Young in the exchequer.

The question is certainly beset with difficulties more pressing than I supposed on the argument; for it was not till after that I had heard or seen anything of the decisions in the learned courts of Virginia and Maine.

My principal object has been to inform myself of the English rule as it stood at the time of our revolution; and I am satisfied, though not without some hesitation, that it is in favor of the defendants in error, and therefore that the superior court decided rightly.

Judgment affirmed.[13]

[12] In addition to the cases cited, see Cummings v. People, 50 Ill. 132 (1869: error); Kent v. Holliday, 17 Md. 387 (1861: demurrer); Delcourt v. Whitehouse, 92 Me. 254, 42 Atl. 394 (1898: demurrer), semble; McGregor v. Balch, 17 Vt. 562 (1845: demurrer, arrest, error), semble; Gould, Pleading (Hamilton's Ed.) 271; 1 Smith's Leading Cas. (8th Am. Ed.) 1409, 1410. Accord.

[13] Hamilton v. Buxton, 6 Ark. 24 (1845), semble; Belden v. Curtis, 48 Conn. 32 (1880: one ground, arrest); Commonwealth v. Davis, 9 B. Mon. (Ky.) 128 (1848: demurrer); Lillard v. Planter's Bank, 3 How. (Miss.) 78 (1838: demurrer); Nealley v. Moulton, 12 N. H. 485 (1842: arrest); Burgess v. Abbott, 6 Hill (N. Y.) 135 (1843: demurrer, query as to special demurrer); Geddis v. Hawk, 10 Serg. & R. (Pa.) 33 (1823: error), semble. Accord.

It has been held that, even where the nonjoinder appears on the face of plaintiff's pleadings, it can be taken advantage of only by plea in abatement. Gray v. Sharp, 62 N. J. Law, 102, 40 Atl. 771 (1898). See, also, Nealley v. Moulton, 12 N. H. 485 (1842).

A misjoinder of parties plaintiff or defendant in actions ex contractu, if apparent on the face of the record, is subject to attack by demurrer, motion in arrest of judgment or on error. 15 Ency. Pl. & Pr. 581, notes 2, 3, 4, 583, note 1; 1 C. J. 131, note 25, 132, note 38. The same is true of misjoinder of plaintiffs in tort. 1 C. J. 131, note 29; 15 Ency. Pl. & Pr. 581, 582. But nonjoinder of plaintiffs in tort, even though appearing on the face of plain-

SECTION 2.—PLEAS TO THE MERITS, ETC.

MORTON v. SWEETSER.

(Supreme Judicial Court of Massachusetts, 1866. 12 Allen, 134.)

Replevin of a horse, commenced before a justice of the peace on the 26th of July, 1864. The defendant was defaulted before the justice, and appealed to September term, 1864, of the superior court. On the seventh day of the term he moved to dismiss, on the ground that another suit between the parties for the same cause of action was pending in that court; and three days after filed an answer, entitled simply, "Answer," beginning thus, "And now the defendant comes and for answer says that he denies each and every allegation in the plaintiff's writ and declaration," denying the defendant's possession at the date of the replevin, and the plaintiff's property and right of possession, and concluding by alleging "that there is now pending another suit between the said parties concerning the same subject matter in the said court, and that during the pendency of said suit the above named suit cannot be maintained and the plaintiff has no cause of action thereon." Vose, J., on inspection of the record, being of opinion that another suit was pending, ordered the present suit to be dismissed; and the plaintiff alleged exceptions.

COLT, J. The pendency of another action for the same cause between the same parties can be taken advantage of only by plea, and, as a general rule, only by plea in abatement. It is a defence which arises from matters which do not appear upon the face of the record, and it must be alleged by plea, that it may be traversed, put in issue and tried, if it is not admitted by demurrer.

A motion to dismiss the action can only be sustained for some matter apparent on the record. If upon the papers in the case there is no fact which can be disputed upon which the defendant relies, it is a proper case for a motion to dismiss. In Nye v. Liscombe, 21 Pick. 266, Shaw, C. J., says: "Where all the facts upon which the claim to have the process abated is founded appear by the record, including the return of the officer, of which the court will take notice without plea, there the action may be dismissed on motion. In that case the motion is not intended to state new facts, but merely to bring to the attention of the court, and also to furnish notice to the other party, of those facts appearing on the record and return which of themselves are sufficient to show that the action cannot be properly proceeded

tiff's pleadings, cannot be reached by demurrer or motion in arrest of judgment. May v. Western Union, 112 Mass. 90 (1873); Deal v. Bogue, 20 Pa. 228, 57 Am. Dec. 702 (1853), semble; True v. Congdon, 44 N. H. 48 (1862), semble; Addison v. Overend, 6 D. & E. 766. Accord. Bell v. Layman, 1 T. B. Mon. (Ky.) 39, 15 Am. Dec. 83 (1824), semble. Contra.

in for want of due service, or other defect in the proceedings." Kittridge v. Bancroft, 1 Metc. 508; Amidown v. Peck, 11 Metc. 467. Buffum v. Tilton, 17 Pick. 510.[14]

Applying these rules, it is plain that the court erred in ordering this action to be dismissed on motion. The pendency of another action was a fact outside the record in this case, which the defendant had a right to dispute. It would ordinarily be settled by the production of the record in the other case; but the plaintiff had the right to dispute the existence of such record, or, admitting its existence, to reply and prove, in answer to the defendant's plea, that the cause of action, though by the record apparently the same, was not so in fact. The course pursued deprived the plaintiff of the opportunity of showing that the property replevied was on the day of the commencement of the second action unlawfully held and detained by the defendant, and that a new cause of action had arisen against the defendant for such detention. Walbridge v. Shaw, 7 Cush. 560.

Exceptions sustained.

At the second trial in the superior court, before Putnam, J., two questions were submitted by agreement of parties to the jury, who found that the horse was the property of the plaintiff, and was in the possession or control of the defendant at the time of the service of the writ; and the parties agreed that the case, taking these facts as found, should be tried by the court.

It appeared in evidence that an action of replevin had been brought by the plaintiff against the defendant on the 29th of June, 1864, for the same horse before the same magistrate, who dismissed that action for informality in the bond, but refused a return of the property; that the defendant appealed to the superior court, which at September term, 1865, rendered judgment, dismissing the action and ordering a return, on which execution was issued and was still unsatisfied. Upon these facts appearing by the records of the magistrate and of the superior court, the judge, on the plaintiff's motion, allowed that record of the magistrate to be recommitted to him for amendment; and the magistrate returned an amended record, showing that no appeal was ever taken from his judgment in this case, which record the judge, against the objection of the defendant, allowed to be filed; and upon this evidence found, as a fact, that there was no suit pending for the same cause of action when the present suit was commenced, and also found that the horse remained in the possession of the plaintiff after it was taken upon the first writ until the day of the service of the second writ, when, just before such service, it was returned to the de-

[14] See, also, Case v. Humphrey, 6 Conn. 130, 140 (1826: record shows no proper service of writ); Tweedy v. Jarvis, 27 Conn. 42 (1858: record shows nonjoinder of necessary party); Adams v. Leland, 7 Pick. (Mass.) 62 (1828: plaintiff himself suggests disability), semble; Mantz v. Hendley, 2 Hen. & M. (Va.) 308 (1808: record shows fatal defects in attachment); Hilton v. Consumers' Can Co., 103 Va. 255, 48 S. E. 899 (1904: record shows fatal defects in service of process).

fendant, and upon all the facts thus found gave judgment for the plaintiff. The defendant alleged exceptions; and the judge reported the whole case for the determination of this court, before which it was argued upon this report in January, 1867, by the same counsel.

GRAY, J. The report of the judge who presided at the trial in the superior court submits the whole case to the determination of this court.

The pendency of a prior action [15] between the same parties for the same cause [16] must be pleaded in abatement,[17] whenever, as in this case, it denies only the plaintiff's right to maintain the particular action, and does not go to his whole title, as in the case of an action qui tam, which vests the property of the thing in action in the party who first sues for it, and so bars all title of any person who may afterwards bring a like suit for the same thing. 1 Chit. Pl. (6th Amer. Ed.) 488; 3 Chit. Pl. (6th Amer. Ed.) 903; Engle v. Nelson, 1 Pen. & W. (Pa.) 442. Matter in abatement, which only delays the right to sue by defeating the particular action, cannot be pleaded in the same plea or answer with matter in bar of all right of action, but must be pleaded, if then existing, before answering to the merits; else it is to be deemed to have been waived. Com. Dig. Abatement, I, 23. Pratt v. Sanger, 4 Gray, 88; Gen. St. 1860, c. 129, § 40. The answer in this action has nothing, in title or form, of a plea or answer in abatement; and all the other defences stated in it are matters pleadable in bar only. The defendant therefore could not under this answer, or under any amendment thereof, avail himself of the defence that a prior action was pending when this one was commenced.

The judgment for the defendant in the other action, not having been rendered upon the merits, but solely for informality in the replevin bond, is no bar to this suit. Walbridge v. Shaw, 7 Cush. 560.

It is therefore unnecessary to consider the validity or effect of the amendment of the magistrate's record in the other action after final judgment therein in the superior court.

Judgment for the plaintiff.

[15] The modern rule is that the plea must show the action to be pending at the time of plea pleaded as well as at the time of action brought. 1 Ency. Pl. & Pr. 755; 1 C. J. 94, note 70; Manufacturers' Co. v. Taylor-Stites Co., 208 Mass. 593, 95 N. E. 103 (1911). But some courts adhere to the ancient rule that pendency at the commencement of the action is sufficient. Gamsby v. Ray, 52 N. H. 513 (1872).

[16] The cause of action and the parties must be averred to be substantially identical in both actions. See 31 Cyc. 181, note 41; 1 C. J. 61, 75; 1 Ency. Pl. & Pr. 757, 761. The former action must also be shown to be pending in the same jurisdiction. 1 Ency. Pl. & Pr. 764; 31 Cyc. 181, note 43; 1 C. J. 85, note, 98, 87, note 22, 88, notes 23 and 24; 42 L. R. A. 449; 26 L. R. A. (N. S.) 969.

[17] It cannot be shown under the general issue. Smock v. Graham, 1 Blackf. (Ind.) 314 (1824); Near v. Mitchell, 23 Mich. 382 (1871); Percival v. Hickey, 18 Johns. (N. Y.) 257, 290, 9 Am. Dec. 210 (1820: one ground).

PRUNTY v. MITCHELL.

(Supreme Court of Appeals of Virginia, 1882. 76 Va. 169.)

Writ of error to judgment of circuit court of Richmond city, in assumpsit, by Jesse Prunty v. W. T. Mitchell and W. W. Cobbs, partners trading in the name of Mitchell & Cobbs, and sequel to the case of Prunty v. Mitchell & Cobbs, reported in 30 Grat. 247. It did not appear on the pleadings, but it was disclosed by the evidence that W. A. J. Finney was a joint contractor with Mitchell & Cobbs in the contract whereon the action was brought, and, on motion of the defendants, the court instructed the jury to find for the defendants, if from the evidence they believed such to be the fact. The jury so found. Plaintiff excepted, as well on the ground of misdirection by the court as of its refusal to set aside the verdict and grant him a new trial.

ANDERSON, J. This is an action of assumpsit by the plaintiff in error, who was plaintiff below, against Mitchell & Cobbs on an account. Upon the trial on the issue of non assumpsit, the court, upon motion of the defendant, instructed the jury that, if they believed from the evidence that the contract for the breach of which the plaintiff sues was made with a partnership firm of which William A. J. Finney was a member, in addition to the two defendants, they should find for the defendants. To this instruction the plaintiff excepted, and it raises the question upon which this case turns.

When a person who ought to join as plaintiff is omitted, if the objection appears upon the pleadings, the defendant may demur, move in arrest of judgment, or bring a writ of error. If it does not appear upon the pleadings, but is disclosed by the evidence, the plaintiff will be nonsuited.[18] But in case of defendants, if a party be omitted who

[18] For numerous cases accord, see 15 Ency. Pl. & Pr. 566; 9 Cyc. 703; 30 Cyc. 141; 1 C. J. 125, note 82.

"A distinction has been taken between actions of assumpsit and actions of tort. In the former case, if one only of several persons who ought to join bring the action, the defendant may take advantage of it on non assumpsit, but in the latter he must plead it in abatement. Boson v. Sandford, 1 Show. 105 [1691], per Holt, C. J.; Dockwray v. Dickenson, Skin. 640 [1692]; Legise v. Champante, 2 Str. 820 [1729]; Graham v. Robertson, 2 T. R. 282 [1788]. [See, for many cases accord, 15 Ency. Pl. & Pr. 567; 30 Cyc. 143, 1 C. J. 126. Ed.] And this distinction is universally adopted. * * * But as soon as it was decided in the case of Rice v. Shute, 2 W. Bl. 695 [1770], and the other cases which followed it, that leaving out one of the joint contractors did not vary the contract, one would have thought that the same principle would be applied to the case of persons with whom the contract was made. If the contract be still the same, notwithstanding one of the persons who ought to be joined is omitted, upon what principle is it that the contract is not the same if one of the persons who ought to join be omitted. Perhaps it may be objected that by this means the plaintiff and the defendant are not upon equal terms; that in an action against one only he necessarily knows all the persons liable; but in actions by one only the defendant may often not know, nor be able to know, what persons ought to join. But in answer to this it should always be remembered that the rule is founded upon the supposed variance between the contract proved and the contract laid, and not upon any inconvenience or convenience to the parties. * * * However, the set-

is liable to be sued jointly with the defendants, the objection can be taken only by plea in abatement, verified by affidavit. 1 Chitty on Pleading, p. 53 (16th A. Ed.)

Mr. Robinson says: "Pleas in abatement on account of all contracting parties not being sued, were first made necessary in the time of Lord Mansfield. It was then adjudged (in 1770) that the defendant must say in his plea who the partners are, and that, if he does not plead the matter in abatement, the objection is waived." 5 Rob. Prac. p. 78. He cites Rice v. Shute, 5 Burr. 2613; 2 Wm. Bl. 695; Abbott v. Smith, 2 Wm. Bl. 947; Buller, J., in Reese v. Abbott, Cowp. 832, and Sheppard v. Baillie, 6 T. R. 329.

Prior to Rice v. Shute it appears from the same writer that the defence of "other joint contractors not sued" would avail upon non-assumpsit if the defendant showed, in an action on a sole contract, that he had promised jointly with another, his issue was regarded as proved. If that doctrine prevailed now, the instructions given by the court in this case could be maintained. The cases which held that doctrine, it seems, were decided after the action of assumpsit was substituted for the action of debt in cases of simple contract, and before the plea in abatement had been introduced for that form of action. For De Gray, C. J., says: "Proof that another also contracted does not prove that I did not contract." And, he observes, this doctrine is as old as the year books.[19] And most of the cases to which he refers,

tled distinction is, as I have before mentioned, and it must be left to the operation of time and the same good sense as at last prevailed in Rice v. Shute respecting defendants, to do away a distinction which seems to me to have no principle for its foundation." 1 Wms. Saunders, 291 i, note 4.

"It is suggested by Mr. Sargeant Williams (1 Saund. 291 f, g, note 4) that since the nonjoinder of one of two joint promisors as defendants is held to be only matter of abatement the rule ought for the sake of consistency to be the same as to joint promisees; i. e., that the nonjoinder of one of two joint promisees as plaintiff should be pleadable in abatement only. But, with submission, are not the two cases essentially different? If A. and B. make a joint promise, it is nevertheless true that each of them promises; and, if so, it follows that a declaration on the promise against A. alone, alleging that he promised, is not disproved by the admission that B. promised jointly with him. But if a promise is made to A. and B. jointly it would seem not correct to say that there is a promise to each of them; and therefore a declaration by A. alone, alleging the promise to have been made to him, without naming B. as a copromisee, is falsified by proof that the promise was made to both of them jointly. In other words, there is a variance between the declaration and the proof. Such, at any rate, is the principle of the distinction recognized by the authorities—a distinction which, it is believed, is not, 'without a difference.'" Gould, Pleading (Hamilton's Ed.) 270, note 184.

[19] "Generally speaking, all joint obligors or contractors ought to be made defendants, and the plaintiff may be compelled to join them all, if advantage be taken of the omission in due time, and by a proper plea. In this restrictive sense is to be understood the rule, which is laid down in general terms, that the plaintiff must join all the parties as defendants. For it seems to be now settled that in all cases of joint obligation or deed, or a joint contract, in writing or by parol, or ex quasi contractu, if one only be sued, he must plead the matter in abatement, and cannot take advantage of it afterwards upon any other plea, or in arrest of judgment, or give it in evidence. * * * In the

Sir James Mansfield remarks, are cases of debt on simple contract, which was the usual mode of declaring previous to Slade's Case. Cited 3 Rob. Prac. c. 73, § 1, p. 389.

But since Rice v. Shute and Abbott v. Smith defendants can avail themselves of the objection only by plea in abatement.[20] Lord Ellenborough, C. J., referring to these cases in 43 Geo. 3 (1802), said: "That since these cases nobody can entertain a doubt that the objection was available not only by plea in abatement, but that it was available in that way only, and cannot be taken advantage of on the general issue." Mr. Robinson cites numerous cases, English and American, in support of this doctrine.

And in his old book on practice, volume 1, p. 163, he says, when one partner is sued alone upon a partnership transaction, the defendant can only take advantage of it by pleading in abatement and pointing out the other partners. His failure to plead in abatement is a waiver of the objection. He cannot, after pleading to issue, give evidence at the trial that there was another partner not joined in the action. And this rule holds, although it should appear by the evidence that the plaintiff knew of the partnership; and he is fortified by the decisions of this court and by other states to which he refers.

It is clear, then, that the instruction is wrong, and that the verdict of the jury, which was in pursuance to it, is also erroneous. The court, is of opinion, therefore, to reverse the judgment of the circuit court, to set aside the verdict and grant the plaintiff a new trial, and to remand the cause for further proceedings to be had thereon in conformity with this opinion.

Judgment reversed.

GERRY et ux. v. GERRY.

(Supreme Judicial Court of Massachusetts, 1858. 11 Gray, 381.)

Action of tort for the conversion of a watch and chain. At the trial in the court of common pleas, it appeared that the watch and chain had been purchased in 1853 by the female plaintiff during coverture, with money earned by her. The defendant objected that upon this evidence the action should have been brought in the name of the husband only; but Sanger, J., for the purposes of the trial, overruled the objection; a verdict was returned for the plaintiffs, and the defendant alleged exceptions.

METCALF, J. This case is not affected by either of the recent statutes of the commonwealth concerning married women, but is to be de-

case of joint bonds and deeds, the rule seems to have been uniform from the 28th H. 6 3. a. down to the present time." I Wms. Saunders, 291 b, c, note 4.

[20] "It would be an affectation of learning to cite authorities for this proposition." Sharswood, J., in Collins v. Smith, 78 Pa. 423, 425 (1875). See 15 Ency. Pl. & Pr. 572–575; 31 Cyc. 691, note 45; 14 Cyc. 439; 9 Cyc. 706.

cided by the rules of the common law. By that law, the watch and chain, which are the subjects of this suit, were the sole property of the husband. No authority need be cited to this point. It follows that the wife has wrongly joined as plaintiff. And the misjoinder of plaintiffs is fatal, both in actions of tort and in actions of contract.[21] When the misjoinder appears on the declaration, it is fatal on demurrer; and before our practice act (section 22) took effect, it would have been fatal on motion in arrest of judgment. When it appears only in evidence at the trial, it is ground of nonsuit, or requires a verdict for the defendant. Archb. Pl. 54; Browne on Actions, 307; Glover v. Hunnewell, 6 Pick. 224; Ulmer v. Cunningham, 2 Greenl. (Me.) 117. These rules of law are applied as well to husbands and wives as to other misjoined plaintiffs. Archb. Pl. 39; Broom on Parties, 229, 230; Moores v. Carter, Hempst. 64, Fed. Cas. No. 9,782a; Van Arsdale v. Dixon, Labor's Supp. (Hill & Denio) (N. Y.) 358; Rawlins v. Rounds, 27 Vt. 17.

In actions of tort, there is a distinction between nonjoinder and misjoinder of plaintiffs. Nonjoinder is matter of abatement only. Thompson v. Hoskins, 11 Mass. 419; Phillips v. Cummings, 11 Cush. 469.

The verdict must be set aside, and a new trial granted. But a new trial will be of no avail, unless the declaration is so amended as to make the husband sole plaintiff.

Exceptions sustained.[22]

WALCOTT v. CANFIELD.

(Supreme Court of Errors of Connecticut, 1819. 3 Conn. 194.)

Action on the case by plaintiff against six defendants. Plea, not guilty. The trial court directed a verdict for all the defendants.[23]

HOSMER, C. J. The declaration alleges that the defendants were proprietors of a line of stages from Hartford to Albany, and that, in consideration of six dollars and fifty cents, they undertook to transport the plaintiff and his baggage from the former to the latter place, in a certain specified time. This engagement they did not perform; and for the damage arising from nonperformance, this action is brought. * * *

Against five of the defendants there was no evidence; and of consequence they were entitled to a verdict. This notwithstanding, the plaintiff claimed a right to a verdict against Canfield, on his separate

[21] That misjoinder of plaintiffs in actions on contract at common law is fatal and need not be taken advantage of by plea in abatement, see 15 Ency. Pl. & Pr. 580, 581; 31 Cyc. 691; 14 Cyc. 438.

[22] For cases accord, see 15 Ency. Pl. & Pr. 581, 582; 30 Cyc. 142; 14 Cyc. 438.

[23] This short statement is substituted for that printed in the official report. A portion of the opinion is omitted.

contract; and the overruling of this claim constitutes the remaining objection in the case.

It is too manifest to require authority that an action founded on contract, against several defendants, cannot be sustained, by the proof of an agreement made by one of them, or by any number, not including all the persons sued.[24] 1 Chitt. Plead. 31; Livingston's Ex'rs v. Tremper, 11 Johns. (N. Y.) 101. The distinction between tort and contract, in this respect, is obvious and familiar. Now, the plaintiff's action was founded on contract, and the nonperformance of it, without the allegation of malfeasance or misfeasance. The cases cited have no bearing on the question between the parties.

There has been a difference of opinion on the question, where the action is brought on contract, and the gravamen has been laid on tortious negligence, or breach of duty, by wrong done, whether a recovery can be sustained against a part of the defendants only. In Govett v. Radnidge, 3 East, 62, it was adjudged that it might be done. This doctrine, however, has not the support of principle; and the above case has been considered as of no authority. Powell v. Layton, 2 New Rep. 364; Max v. Roberts et al., 2 New Rep. 454. The same court which determined the case of Govett v. Radnidge, in the recent determination of Weall v. King et al., 12 East, 452, have virtually overruled their former decision. This was an action against several defendants, alleging a deceit to have been effected, by means of a warranty, made on a joint sale, in which it was adjudged that the plaintiff could not recover upon proof of a contract by one, as of his separate property; the action, though laid in tort, being founded on the joint contract alleged. It was said by Lord Ellenborough: "The argument on the part of the defendant has been that this is an action founded on the tort; that torts are, in their nature, several; and that in actions of tort one defendant may be acquitted, and others found guilty. This is unquestionably true,[25] but still is not sufficient to decide the present question. The declaration alleges the deceit to have been effected, by means of a warranty, made by both the defendants, in the course of a joint sale, etc. The joint contract thus described is the foundation of the joint warranty laid in the declaration, and essential to its legal existence and validity; and it is a rule of law that the proof of the contract must correspond with the description of it, in all material respects, etc. Such allegation requires proof strictly corresponding therewith; it is, in its nature, entire and indivisible, and must be proved as laid in all material respects."

The principle is this: That in actions founded on agreement, the plaintiff, in every essential particular, must prove the contract as he alleged it; and it matters not whether the breach of contract resulted from the omission to perform some act which the defendants ought to

[24] For cases accord, see 15 Ency. Pl. & Pr. 582; 14 Cyc. 438; 9 Cyc. 707.

[25] For cases accord, see 15 Ency. Pl. & Pr. 583; 30 Cyc. 143; 14 Cyc. 438.

perform, or from the improper performance of the act, or from the doing what ought not to have been done.

The other Judges were of the same opinion.

New trial not to be granted.[26]

THOMAS v. WINTERS.

(Supreme Court of Indiana, 1836. 4 Blackf. 161.)

Error to the Vigo Circuit Court.

DEWEY, J. Thomas sued Winters before a justice of the peace on a book account, and recovered judgment against him by default. Winters appealed to the Circuit Court.

In that court, on the trial of the cause, Thomas proved by the admission of Winters that the account was correct and justly due to him. Winters proved that the summons issued by the justice was served upon him out of the township in which it was issued; that he, Winters, resided in the township where it was served, and where the debt was contracted; and that there was an acting and competent justice of the peace in that township at the time. To the admission of this proof Thomas objected; but the Circuit Court heard and considered it, and dismissed that cause for want of jurisdiction. There was no plea put in by Winters; but he was entitled to the benefit of the general issue without pleading it. Rev. Laws 1831, p. 301.

The only question presented by this record is, Was the above evidence on the part of the defendant legally admitted under the general issue? There can be no doubt that, had the facts disclosed in evidence been pleaded before that justice and proved, they would have divested him of jurisdiction of the cause. Rev. Laws 1831, p. 299. If legally admitted in evidence by the Circuit Court, under the general issue, they produced the proper result.

It is generally true, that in suits in courts of general jurisdiction, if an objection to the jurisdiction exist, which does not appear upon the record, it can only be adduced in the form of a dilatory plea, and is lost to the party wishing to use it, if he plead to the merits.[27] But this rule, even in such courts, is not without exceptions. If the action be local, or the remedy be confined to another court by an act of legislation, the plaintiff will be nonsuit by a disclosure of the facts

[26] The common-law rules of pleading as to misjoinder and nonjoinder of parties have been largely changed by statute.

[27] This is the universal rule where the court has jurisdiction of the subject-matter. 12 Ency. Pl. & Pr. 191–193, and cases cited; 1 C. J. 42, note 61. If the lack of jurisdiction appears on the face of the plaintiff's pleadings, a demurrer will lie. 1 C. J. 40, note 43; 12 Ency. Pl. & Pr. 184.

showing want of jurisdiction under the general issue.[28] Bac. Abr. Pleas, E, 1; Taylor v. Blair, 3 Term Rep., 453; Doulson v. Matthews, 4 Term Rep., 503; Parker v. Elding, 1 East, 352; 1 Saund. Plead. 1; Rex v. Johnson, 6 East, 583.

In inferior courts the rule is different. In them want of jurisdiction can be taken advantage of without pleading it. It may be disclosed in evidence under the general issue, and when disclosed will be fatal to the claim of a plaintiff. Bac. Abr. Pleas, E, 1; 1 Chitt. Pl. 425, n. b; Id. 428; Bac. Abr. Courts, D, 4; 1 Saund. Pl. 1.

By our statute no person is "bound to answer any summons, capias, or other process issued by a justice, in civil cases, in any other township than the one in which he actually resides, or where the debt was contracted, or the cause of action accrued, or where the defendant may be found, unless there shall be no justice who can legally issue such summons, capias, or other process." The evidence contained in the record shows that the defendant, Winters, did not live in the township where the process issued, that the debt was not contracted, nor he found there; and it shows that there was an acting and competent justice of the peace in the township in which he did live, and in which the process was served. The justice who tried the cause, therefore, clearly had no jurisdiction over it; and as he possessed an inferior and limited jurisdiction only, the Circuit Court acted correctly in hearing the evidence and dismissing the action.

Per Curiam. The judgment is affirmed with costs. To be certified, etc.

SECTION 3.—DILATORY PLEAS

PITTS SONS' MANUFACTURING COMPANY v. COMMERCIAL NATIONAL BANK.

(Supreme Court of Illinois, 1887. 121 Ill. 582, 13 N. E. 156.)

Action on promissory notes. Plea, that plaintiff and other creditors had agreed to an extension of the time of payment and not to sue on the notes until the extension had expired. A demurrer to the plea was sustained. The defendant stood by its plea, and final judgment was rendered, which the Appellate Court for the Second District affirmed. The record is brought here by writ of error to that court.[29]

Shope, J. The common-law system of pleading has prevailed in

[28] That lack of jurisdiction of the subject-matter may be taken advantage of at any stage of the proceedings, see 12 Ency. Pl. & Pr. 188–190; 11 Cyc. 699, and cases cited; 1 C. J. 36, notes 20–25.

[29] The statement of the case is abbreviated and a portion of the opinion is omitted.

this state, and from time to time such modifications have been made by statute as seemed to be required, removing arbitrary and artificial distinctions, and by the allowance of amendments at any and every stage of proceeding, and to every reasonable extent, doing away with its purely technical and objectionable features. As a system of pleading, and as existing in this state, it is clearly defined, easily understood, and certain. With the general, logical arrangement of the system as at common law there has been no interference by statute. The order of pleading, and the structure and office of pleas of different character, remain substantially unchanged. Without entering into an extended discussion, a statement of some of the principles of pleading seems necessary.

Pleas are divided into two general classes, viz., dilatory and peremptory; otherwise designated as pleas in abatement and pleas in bar. A plea in abatement is defined to be a plea that, without disputing the justness of the plaintiff's claim, objects to the place, mode, or time of asserting it, and requires that therefore, and pro hac vice, judgment be given for the defendant, leaving it open to renew the suit in another place or form, or at another time; while to the second class belong all those pleas having for their object the defeating of the plaintiff's claim. Hence a plea in bar of the action may be defined as one which shows some ground for barring or defeating the action, and makes prayer to that effect. Pleas in bar and pleas in abatement have therefore this marked distinction: pleas in bar are addressed to the merits of the claim, and as impairing the right of action altogether; whereas pleas in abatement tend merely to divert, suspend, or defeat the present suit. 1 Saund. Pl. & Ev. 1, 2; Com. Dig. tit. "Abatement"; 1 Chit. Pl. 441.

Owing to the nature and effect of pleas in abatement, they are required to be certain to every intent. Com. Dig. tit. "Abatement," I 11. Whenever the subject-matter to be pleaded is to the effect that the plaintiff cannot maintain any action at any time, it must be pleaded in bar; while matter which merely defeats the present proceeding, and does not show that the plaintiff is forever concluded, should be pleaded in abatement. 1 Chit. Pl. 445.

Whether a plea is in abatement or in bar is to be determined, not from the subject-matter of the plea, but from its conclusion. The advantage or relief sought by the plea—the prayer of the plea—determines its character. Jenkins v. Pepoon, 2 Johns. Cas. (N. Y.) 312; Tidd, Pr. 637. It would be both illogical and absurd, in a plea in bar, to pray, as in a plea in abatement to the count or declaration, "judgment of the said writ and declaration, and that the same may be quashed"; and as only the relief asked can be awarded, a mistake in this regard is fatal to the plea. And hence the rule that a plea beginning in bar, and ending in abatement, is in abatement; and though beginning in abatement, and ending in bar, is in bar; so, a plea begin-

ning and ending in abatement is in abatement, though its subject-matter be in bar; and a plea beginning and ending in bar is in bar, though its subject-matter is in abatement. Com. Dig. tit. "Abatement," B 2. With respect to all dilatory pleas, the rule requiring them to be framed with the utmost strictness and exactness is founded in wisdom. It says to the defendant: "If you will not address yourself to the justness and merits of the plaintiff's demand, and appeal to the forms of law, you shall be judged by the strict letter of the law." And so it has been held that a plea in abatement concluding, "Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him," etc. (a conclusion in bar), is bad. Jenkins v. Pepoon, 2 Johns. Cas. (N. Y.) 312; Ilsley v. Stubbs, 5 Mass. 280.

An inspection of the plea in question shows that in form and structure, in its beginning and conclusion, it is a plea in bar to the count and declaration; and, upon application of the principles announced, it must be held to be a plea in bar. Its subject-matter, however, is in abatement, and clearly falls within the definition of matter pleadable in abatement. The justness of the plaintiff's demand, that the defendant owes the debt evidenced by the notes, and sued on, is not denied, but the defendant denies that the debt is due. He objects, then, simply as to the time the debt shall be asserted against him. The contract set out in the plea is of an extension of the time of payment; and such a contract, this court has repeatedly held, cannot be pleaded in bar of an action brought before the time has expired. Guard v. Whiteside, 13 Ill. 7; Hill v. Enders, 19 Ill. 163; Payne v. Weible, 30 Ill. 166; Archibald v. Argall, 53 Ill. 307; Culver v. Johnson, 90 Ill. 91.[30]

[30] "In view of the authorities above quoted, we are inclined to think that the defense of nonmaturity of the debt sued upon can be made under the plea of the general issue. Certain cases decided by this court are referred to by counsel for the appellants as holding a contrary doctrine. Among these are * * * Pitts Sons' Manf. Co. v. Commercial Nat. Bank, 121 Ill. 582 [13 N. E. 156 (1887)]. But in all of these cases except Palmer v. Gardiner [77 Ill. 143 (1875)], supra, the facts show that the actions therein were prematurely brought, not because the original debt had not matured, but because there was an agreement to extend the time of payment which had not elapsed at the time of the bringing of the suit. An agreement based upon a valid consideration, to extend the time of payment of the debt to a date beyond the time when the suit is brought, cannot be pleaded in bar of the action, but only in abatement, and cannot therefore be shown under the general issue." Magruder, J., in Bacon v. Schepflin, 185 Ill. 122, 56 N. E. 1123 (1900). That there is some conflict on the right to show prematurity of suit under the general issue, see 31 Cyc. 170, notes 25–31; 16 Ency. Pl. & Pr. 876–880; 1 Ency. L. & P. 17.

"That the action is misconceived is pleadable in abatement, as if assumpsit is brought when account is the only proper remedy; or trespass when case is the proper action. But a plea in abatement for this cause is unnecessary and unusual. For if the mistake appears upon the face of the declaration it is fatal on demurrer; and if not advantage may be taken of it under the general issue.

"That the right of action had not accrued at the commencement of the

The circuit court did not err in sustaining the demurrer to the plea, and, when the defendant elected to stand by its plea, final judgment was properly rendered against it; for the rule is, if matter in abatement be pleaded in bar of the action, final judgment shall be against the defendant, if the plea be disallowed. Com. Dig. tit. "Abatement," I 15. [The court then held that the plea did not set up a composition agreement with creditors.]

The judgment of the appellate court is affirmed.

Judgment affirmed.

GOODHUE v. LUCE.

(Supreme Judicial Court of Maine, 1889. 82 Me. 222, 19 Atl. 440.)

On exceptions.

This was an action of assumpsit, brought in the superior court for Aroostook county, against the defendant Luce alone. The defendant seasonably filed the following plea in abatement to which the plaintiff demurred:

And now on the second day of said term the said George M. Luce comes and defends, etc., when, etc., and prays judgment of the writ and declaration aforesaid, because he says that the several supposed promises in said writ declared upon, if any such were made, were made jointly with one George F. Whitney, who is still living and residing at Presque Isle, in said county, and who likewise was residing at said Presque Isle at the date of said writ, and not by the said George M. Luce alone, and this he is ready to verify; wherefore because said George F. Whitney is not named in said writ and declaration together with said George M. Luce, he the said George M. Luce prays judgment of the said writ and that the same may be quashed.

George M. Luce,
By his Attorney, George H. Smith.

State of Maine.

Aroostook, ss. November 7th, 1888.

Personally appeared Geo. H. Smith, attorney for the before-named George M. Luce, and made oath that the foregoing plea is true in substance and in fact.

Before me, Charles F. Weed, Justice of the Peace.

The presiding justice sustained the demurrer to the plea in abatement and the defendant excepted.

FOSTER, J. This is an action of assumpsit, to which the defendant

suit may be pleaded in abatement, as when an action on contract is commenced before the time appointed for performance. This plea also is seldom used, and for the same reason as is mentioned under the last head." Gould, Pleading (Hamilton's Ed.) 278, 279. See, also, Bacon v. Schepflin, 185 Ill. 122, 56 N. E. 1123 (1900); Warfield v. Walter, 11 Gill & J. (Md.) 80 (1839); Woods v. Nashua, etc., Co., 4 N. H. 527 (1829).

pleads the nonjoinder of a joint contractor in abatement. To this plea the plaintiff has demurred. The court sustained the demurrer, and adjudged the plea bad, to which rulings exceptions were filed. The question thus raised relates to the sufficiency of the defendant's plea.

It is elementary learning that pleas in abatement have always been regarded with disfavor, since they are dilatory in their nature, and seek to defeat the particular action upon technical grounds, instead of allowing the case to proceed to a decision upon its real merits. The rule in relation to the degree of certainty required, both as to the form and substance of such pleas, requires the utmost fullness and particularity of statement, as well as the highest attainable accuracy and precision, leaving nothing to be supplied by intendment or construction,[31] and no supposable special answer to the same unobviated.[32] Co. Litt. 352–356; Burgess v. Abbott, 1 Hill (N. Y.) 477; Furbish v. Robertson, 67 Me. 35.

Yet, while such accuracy and precision are required, the law recognizes the use of these pleas, and, when possessing all the requisites which the law demands, there is no reason why they may not be properly invoked.

Judged by the most formal rules of pleading, the plea in this case possesses every requisite essential in a plea of abatement for nonjoinder of a joint contracting party. It is drawn with accuracy and skill. The pleader has followed the precedents laid down in Steph. Pl. 87; Story, Eq. Pl. 99; 3 Chit. Pl. *900. This precedent has stood the test for many years in the English and American courts, and been cited with approval by the best text-writers. 2 Greenl. Ev. § 24, note. Nor has our attention been called to any authority in which it has been held insufficient.

Non-joinder of another joint contracting party defendant is the issue presented by this plea, and in it are found the necessary allegations. It was the duty of the defendant, by his plea, to furnish the plaintiff such information as might enable him to correct the defect in his writ.[33] This has been done. The joint party is named. He is alleged to be living, and his residence within the state at the date of the plaintiff's writ. Furbish v. Robertson, 67 Me. 35; Harwood v. Rob-

[31] For numerous cases recognizing and applying this rule, see 1 Ency. L. & P. 36, note 15; 31 Cyc. 179, notes 11, 12, 15, 16.

[32] See accord cases cited in 1 Ency. L. & P. 41, notes 11, 12; 31 Cyc. 179, notes 13, 14.

[33] "There are many cases where a plea in abatement need not furnish the plaintiff with a better writ; as a plea that no such person exists as the plaintiff, a plea of nontenure, or plea of disclaimer, and the like. No authorities have been cited by the defendant to establish the position that, when the objection is really one of form and the defendant is bound to give a better writ, he is not required to point out the error and furnish the means of avoiding it in the further prosecution of the cause. The authorities are clearly the other way." Dewey, J., in Wilson v. Nevers, 20 Pick. (Mass.) 20, 23 (1838). See, further, 1 Ency. L. & P. 45; 31 Cyc. 180.

erts, 5 Me. 441, 442; Hooper v. Jellison, 22 Pick. (Mass.) 250. It is broader and more comprehensive than the precedents referred to, inasmuch as it alleges that not only at the date of the writ, but at the time of the plea filed, the residence of such party was within this jurisdiction, following the dicta, rather than the decision, of the court in Bellamy v. Oliver, 65 Me. 108, 110, and the decision in White v. Gascoyne, 3 Exch. 35. The decision in the English exchequer court was based upon a special statute of 3 & 4 Wm. IV. c. 42, passed in 1833, radically changing the common-law practice and requisites of pleas in abatement for nonjoinder of defendants. By that statute it is provided that "no plea in abatement, for the nonjoinder of any person as a codefendant, shall be allowed in any court of common law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the court, and unless the place of residence of such person shall be stated, with convenient certainty, in an affidavit verifying such plea." "This statute," says Coltman, J., in Joll v. Curzon, 4 Man. G. & S. 249, 56 E. C. L. 253, "was designed to remedy an existing inconvenience to which the plaintiff was liable. That inconvenience was that, unless he sued all the parties to the contract, he ran the risk of having a plea in abatement put upon the record; the effect of which might have been, as in Havelock v. Geddes [12 East, 622], that, one of the joint contractors being out of the jurisdiction of the court, the plaintiff must outlaw him before he could proceed with his action against the others."

But the precedents to which we have referred were framed with reference to the law and practice as existing prior to the English statute named, and as it exists to-day in this state; for that statute has never become a part of the common law of this state, nor has it been enacted here.

But it is claimed in support of the demurrer that all that is alleged in the plea may be true, and still the writ held good; that, though the contract alleged may have been made jointly by the defendant and another, yet that joint liability may long before have ceased; that the party not joined may have been discharged in insolvency, or the promise barred by the statute of limitations; and that the plea in abatement is therefore defective in substance, in not excluding such supposable matter as would, if alleged on the opposite side, defeat the plea.

The answer to this proposition is found in the fact that such supposable matter, if it existed, should more properly have been averred in the plaintiff's writ by joining such parties upon the record, even if a discontinuance as to them afterwards became necessary, and that it will not be sufficient for the plaintiff to reply these facts by way of replication to the defendant's plea in abatement.

Thus it has been held that if one of two joint contractors is dead, and the survivor is sued alone, with no mention being made in the writ of the death of the other party, it will not be sufficient for the plaintiff to allege, in reply to a plea of nonjoinder, the fact of his death, for

this would contradict his declaration upon a separate contract by admitting it a joint one. Bovill v. Wood, 2 Maule & S. 25.

In all actions upon contract, the defendant has a right to require that his codebtor should be joined with him, and the plaintiff cannot deprive him of that right, or the benefit, whatever it may be, of having his discharge from liability stated on the record. Hence the practice has always been, in accordance with the approved methods of pleading, to join all the contracting parties, if living, or, if dead, to make the proper averments. Harwood v. Roberts, 5 Me. 441.

And it has been the doctrine of the English courts, as well as that of our own state (Bovill v. Wood, supra; Noke v. Ingham, 1 Wils. 89; West v. Furbish, 67 Me. 17, 19), that where one of the joint promisors had become bankrupt, and obtained his discharge, he must necessarily be joined in the suit in the first instance, for though discharged by operation of law he is not bound to take the benefit of it, although he may, if he will, plead his certificate in discharge, and the plaintiff may then discontinue as to him, upon payment of costs, and proceed against the other.

The rule, as laid down by Chitty (1 Chit. Pl. 42a), is thus stated: "Joint contractors must all be sued, although one has become bankrupt, and obtained his certificate, for, if not sued, the others may plead in abatement."

The decisions of the English courts have been that the plaintiff could discontinue as to one joint contractor, and proceed against the other, applied only in cases of bankruptcy, and that a replication of infancy, coverture, ne unques executor, and the like, of the party not sued, was a good answer to a plea of nonjoinder in abatement, on the ground that in such cases the plaintiff could not enter a nolle prosequi as to one of such joint contractors without discharging all.

But the American courts have taken a different view of the matter, holding that a discontinuance as to a party defendant, in cases where it was proper, was a matter of practice, resting in the discretion of the court, and therefore that whenever defendants sever in their pleas, and one or more pleads a plea which merely goes to his personal discharge, but not denying the cause of action alleged in the writ, the plantiff may prevail against some of the defendants, while he fails as to those who prevail, upon such special matter of defense. Minor v. Bank, 1 Pet. 46, 74, 7 L. Ed. 47; Moore v. Knowles, 65 Me. 493; West v. Furbish, supra; Cutts v. Gordon, 13 Me. 474, 478, 29 Am. Dec. 520; Woodward v. Newhall, 1 Pick. (Mass.) 500; Tuttle v. Cooper, 10 Pick. (Mass.) 281.

Therefore, wherever the American doctrine prevails, it will not be sufficient for the plaintiff, in answer to a plea in abatement for nonjoinder of a copromisor, to reply the fact of something which merely goes to the personal discharge of such copromisor, any more than it would in the case of the death of one joint contractor, where, as we have observed, such replication or answer by the plaintiff to the de-

fendant's plea would not be allowable. 2 Greenl. Ev. § 133; Gibbs v. Merrill, 3 Taunt. 313, 314.

This supposable matter could not, therefore, be "properly alleged on the opposite side to defeat the plea." If it could not, then the plea anticipates and excludes all such matter as could properly be alleged in a replication to defeat the plea, and is sufficient. The case is before this court simply upon exceptions to the ruling of the court below in sustaining the demurrer, and adjudging the defendant's plea bad.

Whether the furtherance of justice will require that the plaintiff, upon proper motion, shall be allowed to amend his declaration, must be determined by the court at nisi prius. Institute v. Haskell, 71 Me. 487, 491; Plaisted v. Walker, 77 Me. 459, 462, 1 Atl. 356; Rev. St. c. 82, §§ 13, 23.

Exceptions sustained. Demurrer overruled. Plea adjudged good. Declaration, bad.

PETERS, C. J., and DANFORTH, LIBBEY, and EMERY, JJ., concurred.

HUMPHREY v. WHITTEN.

(Supreme Court of Alabama, 1849. 17 Ala. 30.)

Error to the Circuit Court of Lauderdale. Tried before the Hon. Daniel Coleman.

Trover by the defendant against the plaintiff in error for the conversion of a horse. The defendant was declared against by the name of James Humphreys and filed as a plea "that he now is and always was called and known by the name of James Humphrey, and not James Humphreys, as by the plaintiff's writ is supposed; wherefore he prays judgment of said writ that the same be quashed." To this plea, which was sworn to by the defendant, the plaintiff demurred, and the court sustained the demurrer. The ruling of the court is now assigned as error.

PARSONS, J. In spelling and in sound there is a perceptible difference between the names of Humphreys and Humphrey. They are different names. The plea in this respect is therefore good. But the plea concludes neither with a verification, nor to the country. It denies the surname, Humphreys, by which the defendant is sued, and avers his true surname to be Humphrey. This last is new matter, and, of course, the plea should have concluded with a verification, in order that the plaintiff might have an opportunity to answer it. 1 Saunders' R. 103, n. 1; Service v. Heermance, 1 Johns. (N. Y.) 91. The plaintiff below filed a general demurrer to this plea, and it was sustained by the Circuit Court. It does not appear upon what ground it was sustained, but it is sufficient that there is a good ground, the omission of the verification. Our statutes relative to amendments and special demurrers have produced no change of the law in respect of

this question, but it stands as at common law. Although there were special demurrers at common law, they were rarely used and never necessary except in cases of duplicity. The statute, 27 Eliz. c. 5, rendered it necessary to demur specially when the party desired advantage of any imperfection, defect or want of form, in any writ, plaint, etc. Then came the statute of 4 Ann. c. 16, § 1, which rendered a special demurrer necessary in relation to various causes, which were still regarded as matters of substance. This statute, among other things, rendered it necessary to demur specially for the want of the averment or verification in question. But these statutes did not extend to pleas in abatement. It was never necessary to demur specially to them. 1 Tidd's Practice, 695, 696, ninth edition. By our statute of 1807 it became necessary here to demur specially for any defect or want of form in writs, declarations, or other pleading, etc. Clay's Dig. 321, § 50. The want of the necessary verification in concluding a plea in bar could only be taken advantage of since this statute, I presume, by a special demurrer. But the act of 1824 takes away all special demurrers. Clay's Dig. 334, § 118. It says "no demurrer shall have any other effect than that of a general demurrer." I presume there is no mode now of taking advantage of an error of this kind, in a plea in bar. But this is not the case here in relation to a plea in abatement, any more than in England, for it has been held by this court that our statutes do not extend to pleas in abatement, or, at least, that the last-mentioned act does not. Casey v. Cleveland et al., 7 Port. 445. We have no hesitation in concluding that pleas in abatement are not affected by these statutes and that they are left as at common law when a special demurrer was never necessary, unless in cases of duplicity. Let the judgment be affirmed.[34]

[34] For numerous cases accord, see 1 Ency. L. & P. 70, note 14; 31 Cyc. 272, note 14.

"In Chitty on Pleading, vol. 1, p. 499, Stephen on Pleading, p. 141, note, and Saunders on Pleading, etc., vol. 1, p. 4, it is laid down generally that demurrers to pleas in abatement need not be special. But the authority, and the sole authority, referred to by them all, is the case of Lloyd v. Williams, 2 M. & S. 484 (1814).

"But on examining this case, we find that it is one of the many instances where a very broad doctrine has been laid down in a headnote, on authority of a case which does not sustain it. It was not a case of demurrer for duplicity, and therefore that case did not come in conflict with the old well-settled doctrine that demurrers for duplicity must always be special. But still the law has so long (on authority of the text-books) been considered as settled that we do not feel at liberty to unsettle it." Potter, J., in Hoppin v. Jenckes, 9 R. I. 102, 105 (1868).

Even where misnomer appears on the face of the declaration, it is not ground for demurrer. Rich v. Boyce, 39 Md. 314 (1874) semble; Hudson v. Poindexter, 42 Miss. 304 (1868), semble; Slocum v. McBride, 17 Ohio, 607 (1848).

RYAN v. MAY.

(Supreme Court of Illinois, 1852. 14 Ill. 49.)

CATON, J. This action was brought upon a note payable to the bank, by Ryan, surviving assignee of the bank, in whom the legal title was vested by the assignment and several acts of the legislature. The defendant filed a plea in abatement, which states in substance that Ryan was not the assignee of the bank, and had no legal interest in the note sued on, because he with others had, by a certain deed of indenture, conveyed and transferred the note to William Thomas. To this plea a replication was filed averring that Ryan did not by indorsement on the note assign it to Thomas, so as to vest the legal title in him. To this replication a demurrer was filed which was sustained by the circuit court, and judgment rendered for the defendant on the plea in abatement. The defence set up by the plea was certainly not answered by the replication, and if the plea was good, the replication was undoubtedly bad. The plea states that Ryan assigned the note to Thomas by a separate instrument. This statement is not denied by the replication, but that avers that Ryan did not assign it by indorsement thereon. The plea in our opinion was insufficient. It did not show that the legal title to the note had passed out of Ryan. By our statute the legal title to a note cannot be transferred by a separate instrument in writing. The statute says that the note, bond, bill, etc., "shall be assignable by indorsement thereon, under the hand or hands of such person or persons, and of his, her, or their assignee or assignees in the same manner as bills of exchange are, so as absolutely to vest the property thereof in each and every assignee or assignees successively." This is the mode pointed out by the statute, and it must be pursued in order to vest a right of action in the assignee of a note. The plea, therefore, did not show that the legal title had passed from the plaintiff to Thomas. The demurrer should have been carried back to the plea.

But the defendant insists that the declaration was also bad, because the time had elapsed within which the assignees were required to wind up the affairs of the bank, and that hence the rights of the plaintiff as assignee had ceased. This question we are not at liberty now to investigate. It is a general rule that a demurrer must be carried back and sustained to the first defective pleading. This rule does not apply, so as to carry a demurrer behind a plea in abatement. If the plea is bad, the judgment must be respondeat ouster. In stating the exceptions to the general rule that a demurrer must be sustained to the first defective pleading, Mr. Stephen says: "First, if the plaintiff demur to a plea in abatement, and the court decide against the plea, they will give judgment of respondeat ouster, without regard to any defects in the declaration." Stephen's Plead. 144. This rule was applied in

Rich v. Pilkington, Carthew's R. 171, and in Hastrop v. Hastings, 1 Salk. 212.

When we consider the peculiar character of a plea in abatement, the reason is obvious. Unlike other pleas, a plea in abatement does not profess to answer the declaration, or defeat the cause of action. It goes only to the writ. It would be inconsistent with all sound rules of pleading, to carry a demurrer to one pleading back to another, to which it did not profess to be an answer, and with which it had no connection. Dean v. Boyd, 9 Dana (Ky.) 179; Crawford v. Slade, 9 Ala. 887, 44 Am. Dec. 463. The demurrer should have been sustained to the plea in abatement, and a judgment rendered that the defendant answer over.

The judgment of the circuit court must be reversed, and the cause remanded.

Judgment reversed.[35]

CLARK v. LATHAM.

(Supreme Court of Arkansas, 1867. 25 Ark. 16.)

WALKER, C. J.[36] This is an action of debt, by attachment, to which several pleas in abatement were filed, for an alleged insufficiency of the writ and of the attachment bond. To these pleas demurrers were filed and overruled. It appears, from the record, that the plaintiff was given leave to reply, and did, on the same day, file several replications to each of the pleas in abatement. At a subsequent day of the term, the defendant moved the court to strike the replications from the files, and to render final judgment in his favor, upon his pleas in abatement; which motion was sustained by the court, the replications stricken out, and final judgment rendered in favor of the defendant, and for costs. The plaintiff excepted to the opinion of the court, made the replications part of the record, and appealed.

The appellant contends that the judgment of the court below, upon his demurrer, was not necessarily final; and that, unless under extraordinary circumstances, it is the duty of the court, after demurrer overruled to a plea in abatement, to permit the plaintiff to reply to it; and that the court, in this instance, having granted such leave, under which replications were promptly filed, it was error, upon the motion of the defendant, to strike them from the files and render final judgment against her.

After a careful examination of most of the English cases, upon the authority of which the common-law rule of practice seems to have been established, as well as of several American decisions in affirmance of the common-law rule, we have been unable to find in any of them

[35] For cases accord, see 1 Ency. L. & P. 71, note 17; 31 Cyc. 343, note 37.

[36] A portion of the opinion is omitted.

a satisfactory reason for holding that, where the judgment upon a plea in abatement is for the defendant, final judgment must as of right be rendered in accordance with the prayer of the plea. So to hold certainly militates against the rule which disfavors dilatory pleas. Yet we find, upon looking into the authorities, that it is a well-established rule of the law, from which the American courts have not departed, that where an issue of either law or fact, upon a plea in abatement, is found for the defendant, the judgment is that the writ be quashed. Tidd's Practice, 642; Stephen on Pleading, 107; Archbold's Civil Pleading, 315; Chitty's Pl. vol. 1, 466; McKinstry v. Pennoyer, 1 Scam. (Ill.) 319; Motherell v. Beaver, 2 Gilman (Ill.) 69; Cushman v. Savage, 20 Ill. 330; Eddy v. Brady, 16 Ill. 306.[37] And so absolute is this rule that it has been held that it is error to grant leave to reply after demurrer to a plea in abatement overruled. 1 Scam. 319; 2 Gillman, 69.

In the State of Alabama, by statute, the rule has been changed. Skinner, Judge, who delivered the opinion of the court in Eddy v. Brady, remarked that he could see no good reason why, upon principle, where the demurrer is overruled, the judgment should be final, and the plaintiff should not be allowed to take issue upon the truth of the plea, but that, in the absence of a statute changing the practice, the courts were not at liberty to depart from it.

Upon examination of our statute, we find no provision under which this rule may be relaxed. And in accordance with the authorities cited, we must hold that, in this case, leave to the plaintiff to reply was improvidently granted, and that it was not error in the court below to strike them from the files and render final judgment for the defendant. * * *[38]

[37] Gould, Pleading (Hamilton's Ed.) 287; E. O. Painter, etc., Co. v. Dupont, 54 Fla. 288, 292, 45 South. 507 (1907), semble; Campbell v. Hudson, 106 Mich. 523, 528, 64 N. W. 483 (1895), semble. Accord.

[38] "Did the court err in refusing leave to reply to the plea in abatement? Pleas in abatement, being dilatory defenses, are not favored; they are not amendable; they must be interposed at the first opportunity; yet, if a demurrer is sustained to such a plea, the judgment is respondeat ouster, and the defendant may plead to the action. [Stephen, Pleading (Williston's Ed.) *116; Gould, Pleading (Hamilton's Ed.) 287; 1 Ency. Pl. & Pr. 30; 1 Ency. L. & P. 72, and cases in note 1; 31 Cyc. 351, note 38. Accord.—Ed.] Why, then, upon principle, where the demurrer is overruled, the judgment should be final, and the plaintiff should not be allowed to take issue upon the truth of the plea, seems difficult to comprehend, and an anomaly in pleading. But such is the law, and the legislature alone is competent to change it." Skinner, J., in Eddy v. Brady, 16 Ill. 306, 307 (1855).

ALLING v. SHELTON.

(Supreme Court of Errors of Connecticut, 1844. 16 Conn. 436.)

This was a writ of replevin, brought by Chester Alling against Charles T. Shelton, to obtain the possession of goods belonging to the plaintiff, which had been taken, by a writ of attachment in the defendant's favour, against Leverett Alling. In connexion with the writ of replevin there was a count in trespass.

In the county court to which the suit was brought, the defendant pleaded in abatement that said writ of replevin was issued without any notice to the defendant being served on him that it was about to issue, that he might appear before the authority about to issue the same, and be heard relative to the amount of the bond and the sufficiency of the surety, offered by the party applying for said writ of replevin. The fact alleged in the plea in abatement was traversed by the plaintiff, on which issue was joined to the jury. After a trial before the jury on this issue, they returned a verdict for the plaintiff. The court accepted the verdict, and thereupon rendered judgment that the defendant answer over to the plaintiff's declaration. * * *

WILLIAMS, C. J.[39] The plaintiff claims that the judgment below shall be reversed, because after issue joined, and tried by the jury, and found for him, the judgment was not peremptory, but respondeas ouster.

That this judgment was not correct, according to the English practice, cannot be doubted. At an early period this question seems to have been settled, as appears by a case cited in Eichora v. Lemaitre, 2 Wills. 367, and confirmed by uniform decisions ever since. Amcots v. Amcots, T. Raym. 118; s. c. 1 Sid. 252; s. c. 1 Vent. 22; Bonner v. Hall, 1 Ld. Raym. 338; s. c. Carth. 433; Crosse v. Bilson, 2 Ld. Raym. 1022; Medina v. Stoughton, 1 Ld. Raym. 593; Thompson v. Colier, Yelv. 112; 2 Wms. Saund. 211, n. 3.

In our sister states the authorities are not much less uniform. In Massachusetts it is treated as settled law. Boston Glass Manufacturing v. Langdon, 24 Pick. 49, 35 Am. Dec. 292. And in New Hampshire. Dodge v. Morse, 3 N. H. 232; Jewett v. Davis, 6 N. H. 518. In Vermont the same final judgment is rendered, whether the issue is tried by the court or the jury. Peach v. Mills, 13 Vt. 501. So too in New York they have decided as in Massachusetts. Haight v. Holley, 3 Wend. 258; McCartee v. Chambers, 6 Wend. 649, 22 Am. Dec. 556. And in Pennsylvania. Hollingsworth v. Duane, Wal. Sr. 154, Fed. Cas. No. 6,618; McHaffy v. Share, 2 Pen. & W. 361. In Kentucky the courts have come to the same result. Moore v. Morton, 1 Bibb, 234. And in Indiana. John v. Clayton, 1 Blackf. 54.[40]

[39] A portion of the statement of facts and of the opinion are omitted.

[40] For numerous other cases accord, see 1 Ency. Pl. & Pr. 31; 1 Ency. L. & P. 78, note 25; 23 Cyc. 773, note 39.

But it is claimed that such is not the practice in this state. That parties have sometimes acquiesced in such judgments in this state is certainly true; but that this has been the uniform practice is not true. It is certainly true that if an issue in fact is tried by the court, and found against the defendant, the judgments have, for half a century, been respondeas ouster. Fitch v. Lothrop, 1 Root, 192; Nichols v. Heacock, 1 Root, 286; Thomas v. Dorchester, 2 Root, 124. But so far from impairing the common-law rule as to the effect of a verdict upon such an issue, the judge, who assisted in these decisions, and reported them, puts it down among "points of law adjudged," that, when the court determine the plea to be insufficient, the judgment is that the defendant shall answer over to the action; but if the issue is joined to the jury, and they find against the defendant, they assess damages for the plaintiff. 1 Root, 566. And such was the distinction taken by the superior court in Bird v. Thompson, Litchfield county, 1801, MSS. of Judge Mitchell. And Judge Gould, though not satisfied with the distinction, speaks of its having been recognized by the supreme court of errors. Gould's Pl. 301. And Judge Swift, who, in his system, has laid it down as law that a finding upon such an issue, whether by the court or jury, would be final (2 Swift's Syst. 204), in his last work, speaking of our practice on trial by the court (after laying down the common law rule), says this practice, i. e., of a respondeas ouster after issue to the court, unknown to the common law, has never received the sanction of the court of dernier resort (1 Sw. Dig. 613). After the doubts suggested by these eminent judges, we ought to say that the practice of not rendering a peremptory judgment, where the issue has been tried by the court, has been too long settled, and too often recognized by the superior court, to be disturbed at this late period.

On the other hand, we know of no such practice, much less of such decisions, as will justify us in departing from the common-law rule upon verdicts of the jury. The reason of this rule is said to be that the common law admits of but one issue to the jury. 1 Sw. Syst. 205. Another reason assigned is that where a man pleads as true a fact that he knows to be false, and a verdict be against him, it ought to be final; and every man must be presumed to know whether his plea be true or false. 2 Wils. 368. The true reason, we think, is that pleas of this description are usually merely dilatory pleas, which it is the policy of the law to discourage; they are those required to be filed early, and not allowed to be amended and made conclusive, if the defendant will risk a trial by jury thereon. We think, therefore, the judgment must be reversed. * * *[41]

[41] "This rule, which is as ancient as the common law, is still maintained wherever the common law prevails. * * * A reason given for this peremptory judgment is that, the defendant choosing to put the whole weight of his cause on this issue when he might have had a plea in chief, it is an admission that he had no other defense. 1 Bacon's Abr. tit. Abatement, P. 1 Chitty on Pl. 458, gives as a reason that the plea is found to be untrue. Other writers

say that the judgment is not peremptory on demurrer, because the party is not supposed to be conusant of the matter in law, while he is supposed to be conusant of the matter in fact by him pleaded." Tyler, J., in Jericho v. Underhill, 67 Vt. 85, 87, 30 Atl. 690, 48 Am. St. Rep. 804 (1894).

"This plea presented his only defense to plaintiffs' suit, and when the jury found against him on this defense, it was thereby determined that plaintiffs were entitled to recover in the action, as much so as if the verdict had been against defendant on a plea of the general issue. The only question left unsettled was as to the amount of plaintiffs' recovery. The court could and should have directed the jury which tried the issue to assess the damages, in case it found for the plaintiffs upon the issues joined. Failing to do that, the court should have proceeded in some other legal manner to ascertain the amount which plaintiffs were entitled to recover. 1 Tidd's Practice, pp. 574, 576." Carter, J., in Bishop v. Camp, 39 Fla. 517, 519, 22 South. 735 (1897).

CHAPTER VI

CROSS-DEMANDS

SECTION 1.—RECOUPMENT

BARBER v. ROSE.

(Supreme Court of New York, 1843. 5 Hill, 76.)

Error to the Rensselaer C. P. Rose sued Barber in a justice's court, and declared in assumpsit on the common counts, and also on a special contract by which the plaintiff agreed to lay a quantity of stone wall and dig a certain ditch for the defendant for the sum of $100. The declaration further averred that, after performing a part of the work, the defendant agreed to aid the plaintiff in completing the job for a reasonable compensation. The plaintiff claimed $100 damages. Plea, the general issue and set-off; also that the plaintiff never finished any part of the ditch, to the defendant's damage of $100. Replication, that plaintiff had finished the ditch. On the trial before the justice, it appeared that the plaintiff agreed to build the wall and dig the ditch for the price mentioned in the declaration, the work to be completed by a certain time. The plaintiff commenced the work, but, failing to complete it by the stipulated time, the defendant told him to go on with the job, and that he (the defendant) would turn in and help him on being allowed a compensation for his services. The defendant accordingly furnished assistance to the plaintiff, and the work was finally finished. The defendant offered to show, among other things, by way of recoupment of damages, that he had sustained loss by reason of the ditch not having been finished at the time specified in the original contract. The plaintiff objected, on the ground that the time had been extended by the agreement of the parties; and the justice sustained the objection. The jury rendered a verdict in favor of the plaintiff for $52, whereupon he remitted the excess beyond $25, and the justice gave judgment for that sum, with costs. The common pleas affirmed the judgment on certiorari, and Barber sued out a writ of error.

COWEN, J. There is no doubt of the plaintiff's right, when the damages found in his favor exceed the amount claimed in his declaration, to remit the excess and take judgment for the sum demanded; and no good reason has been urged against his doing so in any case.

The defendant consented that the plaintiff should go on and finish his job after the time fixed for it by the original contract had gone by.

He went on accordingly; and this raised a claim in his favor upon a quantum meruit. But I do not think it necessarily operated as a waiver of damages for not performing the special contract. The amount of the whole was that the defendant, finding himself implicated with a man who was remiss in the performance of the job, preferred going through under some new arrangement, to being off entirely, refusing to pay anything for what had been done, and resorting to another laborer. He might have been, and probably was, far from intending to release whatever damages might have accrued from overgoing the time. A cause of action had arisen in his favor, and he did not discharge it nor agree that the plaintiff should go free in consideration of doing in part what he had bound himself to do in whole, even if that would have been a valid consideration. In short, the waiver of time was not a waiver of damages, as I admit it would have been if the contract had been modified before the time arrived. Treating the waiver as a modification of the first contract, and regarding both as one, which is perhaps a correct way of putting the case, still there would remain the implied equitable term that, if the defendant had been seriously damnified, he should be paid. In strictness, therefore, I think the defendant was entitled to recoup the damages; or, if they had been large enough, he might have urged them as a bar to all claim under the special contract. Sickels v. Pattison, 14 Wend. 257, 28 Am. Dec. 527; Ives v. Van Epps, 22 Wend. 155; Ladue v. Seymour, 24 Id. 69; Batterman v. Pierce, 3 Hill, 171; Still v. Hall, 20 Wend. 51. In Allen v. Cameron, 1 Cr. & Mees. 832, where the work was imperfectly done, under an agreed price, Vaughan, B., said, "I think the rule that there should be an abatement of price for the nonperformance of any part of the contract by the plaintiff is a convenient rule." Bayley, B., said, "The case of Street v. Blay puts this in a plain and satisfactory point of view, not leaving the defendant to a cross-action to recover for the diminution in value by reason of the plaintiff's nonperformance of the contract, but entitling him to deduct the amount of damages he has sustained." Id. 840, 1.

Was the proof in mitigation admissible under the general issue? I think that question arises. There was no notice of a claim for the default as to time; but only for not completing any part of the ditch. This rather precluded the idea that the defendant intended to put himself on time, and the evidence was not admissible unless proper under the general issue.

The rule of recoupment has come to us from England, accompanied with the remark that, where the quality of work done at a stated price is to be impeached, notice of the defence is proper. Lord Ellenborough, C. J., and Lawrence, J., in Basten v. Butter, 7 East, 479. Counsel had complained of surprise, and Buller, J., had refused to allow the defence, while Lord Kenyon had allowed it; and the remarks mentioned seem to have been thrown out, first, as a reply to the counsel, and, secondly, as possibly tending to reconcile the conflicting decisions

of the judges. They probably led the chancellor to say, in Reab v. McAlister, that he considered a like defence perfectly just and equitable when the plaintiff has notice of it. In Ives v. Van Epps, 22 Wend. 157, the point was raised; but it was not thought necessary to decide it. I there said notice may be necessary, but added that the rejection of the evidence was not put on the want of it. The question has never been much thought of, so far as I can discover, nor do I find it has ever become necessary to decide it in any of the cases where it has been mooted. In no English case, except Basten v. Butter, is the idea of notice suggested. Other decisions have gone forward without any attention to it. King v. Boston, 7 East, 481, note (a), A. D. 1789; Farnsworth v. Garrard, 1 Camp. 38, A. D. 1807; Okell v. Smith, 1 Stark. Rep. 107, A. D. 1815; Poulton v. Lattimore, 9 Barn. & Cress. 259, A. D. 1829; Allen v. Cameron, 3 Tyrwh. 907, 1 Cr. & Mees. 832; s. c. A. D. 1833; Street v. Blay, 2 Barn. & Adolph. 456, A. D. 1831, recognizing Cormack v. Gillis, cited 7 East, 480, 481. And see Cousins v. Baddon, 1 Gale, 305. These cases belong to two classes, one where the defence was partial, another where it was total. The want of notice was equally disregarded in both. Mr. Leigh, in his late book on Nisi Prius (volume 1, p. 79), deduces the rule from Basten v. Butter in these words: "The defendant should (though he need not) give notice to the plaintiff of the intended defence; for otherwise he may have ground to complain of surprise, as he may only come prepared to prove the agreement for the specific sum." I presume he means to be understood as saying that the defendant may or may not give notice at his pleasure; but if he gives none, the court will listen more readily to a motion for a new trial on the ground of surprise. That any judge or writer ever intended to lay the rule down as one of pleading, I do not believe. There is no color in precedent or principle for saying that a defence striking directly at the whole cause of action need be pleaded in an action of assumpsit; and there is still less ground for saying that a partial defence—matter going merely to mitigate damages—should be pleaded. A partial defence can never, according to our cases, be introduced by a plea;[1] and the universal rule both in England and this state is that, where a matter cannot be pleaded, it may be given in evidence. Herkimer Manufacturing & Hydr. Co. v. Small, 21 Wend. 273, 277; Wilmarth v. Babcock, 2 Hill, 194, 196. No one will pretend that the statute of special notice applies; for by that you can give notice of such matter only as may be pleaded. Wilmarth v. Babcock, ut supra. The matter does not come in as a set-off, and so is not within the statute of notice with respect to that. In short, I am satisfied that to require notice of a defence by way of recoupment in any case, would be a departure from principle, from precedent, and all the analogies of pleading. The truth is, as remarked by Mr. Justice Bronson in Batterman v. Pierce, the doctrine of recoupment is of recent

[1] See Fleming v. Mayor, supra, p. 439, and notes thereto.

origin.[2] It would not have been surprising, therefore, after the remarks in Basten v. Butter, had some judges required a plea or notice.

[2] "The common law, confining every suit to the particular subject of litigation that gave rise to it, rigidly excluded all matters of set-off; but the English court of chancery, extending the narrow remedies of the common law, in order to prevent circuity of action and suppress multiplicity of litigation, introduced the principle into their system from the civil law, where it existed under the name of compensation. This method of settling cross-demands in one suit, when once introduced, recommended itself so strongly by its natural equity and practical usefulness that it was ultimately adopted to a limited extent, both in England and the United States, in various statutes of set-off, and still further, in our own state, by the statute in relation to the failure of consideration. These acts concerning set-off, however, only recognize the right of persons mutually indebted to one another in ascertained amounts, under independent contracts, to set off their respective debts by way of mutual deduction, so that in any action brought for the larger sum the residue only should be recovered, and so excluded from their operation claims for unliquidated damages occasioned either by wrongs done or obligations violated. These were left to the common law, and the same reasons that forced the doctrine, to a partial extent, into the statute law of the land, still continuing to operate, the old doctrine of recoupment has been recently greatly extended in its practical application.

"In 1 Dyer's Rep. 2-6 [1515], it is laid down in the reign of Henry VIII: 'If a man disseize me of land, out of which a rent charge is issuant, which has been in arrears for several years, and the disseisor pay it, if the disseisee recover in our assise, the rent that the disseisor paid shall be recouped in damages.'

"Again, in Coulter's Case (5 Rep. 2-31), it is said: 'And as to the case of recouper in damages, in the case of rent service, charge or seck, it was resolved that the reason of the recouper in such case is, because otherwise, when the disseisee re-enters, the arrearages of the rent service charge or seck would be revived, and therefore to avoid circuity of action, and "circuitas est evitandus, et boni judicis est lites, dirimere, ne lis ex lite oriatur," the arrearages during the disseisin shall be recouped in damages.'

"Pullen v. Staniforth, 11 East, 232 [1809], was an action on a policy of insurance, upon a voyage to Russia, with a provision that, if the cargo were denied permission to be landed, the master should on his return, receive in London £2,500. The outward cargo was denied landing, but the master, instead of returning direct, went by Stockholm and earned freight. The master claimed the £2,500, but the freight earned was recouped out of the sum agreed to be paid.

"In Barbour's Law of Set-Off (26) it is laid down that 'there is a species of defense somewhat analogous to set-off in character, which a defendant, in some cases, is allowed to make, and which is called recoupment. This is where the defense is not presented as a matter of set-off arising on an independent contract, but for the purpose of reducing the plaintiff's damages, for the reason that he himself has not complied with the cross-obligations arising under the same contract. Thus, in an action to recover compensation for services rendered, the employer is entitled to show by way of recoupment of damages the loss sustained by him through the negligence of the person employed, and so in regard to a breach of warranty.' Recoupment, in its origin, we are told (Sedgwick on Dam. [3 Ed.] 431), was a mere right of deduction from the amount of the plaintiff's recovery, on the ground that his damages were not really as high as he alleged; and Viner's Abridgment, tit. Discount (3, 4, 9, 10), is referred to as authority.

"The American cases, however, at least in New York, Massachusetts, Alabama, and some few other states, now go to the full length of declaring that all matters of counterclaim arising out of the same transaction, and not technically the subject of set-off, can be set off by way of recoupment of damages, provided the defendant has been properly apprised of the defense, and these cases will now be briefly referred to. * * *

"Several of the states, however, have not yet carried the doctrine to the

The cases fluctuated for some time both in England and this state on the question whether the doctrine itself should be received into the law. About as much has been said on the point of notice in one country as in the other; but not enough in either to give any serious countenance to the idea that it is necessary.

On the whole, I am entirely satisfied that the fact of the plaintiff's contract having been broken as to time formed a good ground for claiming damages by way of recoupment, and that the defence was admissible under the general issue.[3] The judgment of the common pleas affirming that of the justice should be reversed.

BRONSON, J. Although it may never have been directly and necessarily decided that the defendant must give notice of his intention to recoup damages, it has often been assumed by the courts of this state

extent that it has been carried in the states to whose decisions we have referred, although the decisions in all the states are evidently tending rapidly that way, and the English courts, much less inclined than our own to relax old rules, have, as yet, fallen far short of the American decisions. They now hold, however, contrary to their decisions prior to Basten v. Butter, 7 East, 479 [1806], that, upon a sale or a special contract for work, at a specific price, the defendant may show, in diminution of the amount to be recovered, a breach of warranty or the failure of the contractor to do the work as required; and in Mondel v. Steel, decided in 1841 (8 Mees. & W. 858), Parke, Baron, addressing himself to this subject, remarked: 'Formerly it was the practice, where an action was brought for an agreed price of a specific chattel sold with warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross-action for breach of the warranty or contract; in which action, as well the difference between the price contracted for and the real value of the articles or of the work done, as any consequential damage, might have been recovered; and this course was simple and consistent.' But after the case of Basten v. Butter a different practice, which had been partially adopted before in the case of King v. Basten, began to prevail, and, being attended with much practical convenience, has since been generally followed; and the defendant is now permitted to show that the chattel, by reason of the noncompliance with the warranty, in the one case, and the work, in consequence of the nonperformance of the contract, in the other, were diminished in value. It is not so easy to reconcile these deviations from the ancient practice with principle, in those particular cases above mentioned, as it is in those where an executory contract, such as this, is made for a chattel to be manufactured in a particular manner, or goods to be delivered according to a sample where the party may refuse to receive, or may return, in a reasonable time, if the article is not such as bargained for: for in these cases the acceptance or nonreturn affords evidence of a new contract on a quantum valebat. It must, however, be considered that, in all these cases of goods sold and delivered with a warranty, and work and labor, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established, and that it is competent for the defendant, in all of those, not to set off, by a proceeding in the nature of a cross-action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself, by showing how much less the subject-matter of the action was worth by reason of the breach of contract.'" Leonard, J., in Grand Lodge of Masons v. Knox, 20 Mo. 433, 436–441 (1855).

[3] English v. Wilson, 34 Ala. 201 (1859); Babcock v. Trice, 18 Ill. 420, 68 Am. Dec. 560 (1857); Peirce v. Sholtey, 190 Ill. App. 341 (1914); Tevebaugh v. Reed, 5 T. B. Mon. (Ky.) 179 (1827); Sullivan v. Boswell, 122 Md. 539, 89 Atl. 940 (1914); Gregory v. Tomlinson, 68 Vt. 410, 35 Atl. 350 (1896); Columbia Ass'n v. Rockey, 93 Va. 678, 25 S. E. 1009 (1896), semble. Accord.

that notice must be given; and such appears to be the general opinion of the profession. Very few cases have fallen under my observation where the defence was attempted without a notice.

If this must be regarded as an open question, then, upon principle, I think notice should be required. The defendant often has an election either to bring a cross-action or to set up his claim by way of recouping damages; and without a notice the plaintiff may be surprised on the trial by a defence which he is wholly unprepared to meet. There can be no hardship upon the defendant in requiring him to give notice, while a different rule would be likely to work injustice. I am aware that notice is not necessary where the defence goes to the whole consideration of the promise on which the plaintiff sues. Such a defence shows that the plaintiff has no cause of action, and is fairly covered by the plea of non assumpsit. But it is not so where, as in this case, the defence admits that the plaintiff has a right to sue, and seeks to recoup damages on the ground that the plaintiff has failed to perform some stipulation in the contract which was obligatory upon him. In such a case notice should be given.[4]

But the defence seems to have been rejected on the ground that it was not, in its own nature, admissible. The want of notice was not mentioned in the court below. On this ground I agree that the judgment should be reversed.

NELSON, C. J., concurred in this view of the question.

Judgment reversed.

SECTION 2.—SET-OFF

COE v. GIVAN.

(Supreme Court of Judicature of Indiana, 1825. 1 Blackf. 367.)

Appeal from the Marion Circuit Court.

BLACKFORD, J. assumpsit. Pleas: 1st, nonassumpsit; 2dly, that the plaintiff owed the defendant the sum of 101 dollars and 46 cents for money advanced, which was more than the plaintiff ought to recover. Upon these pleas issues were joined. At the trial the jury were instructed that, if the payment by the defendant was greater than the demand of the plaintiff, as proved, their verdict should be in favour of the defendant for the balance.

[4] See, also, McLure v. Hart, 19 Ark. 119 (1857: special plea or notice under general issue); Puffer Co. v. Krum, 210 Mass. 211, 96 N. E. 139 (1911: inadmissible under general issue); Simonds v. Cross, 63 N. H. 123 (1884: inadmissible under general issue); Sterling Organ Co. v. House, 25 W. Va. 64 (1884: general issue with notice). In some states the matter is regulated by statute or rule of court. See 31 Cyc. 698, note 3. With reference to notice under the general issue generally, see Rosenbury v. Angell, supra, p. 501, and notes thereto.

Verdict against the plaintiff for 34 dollars and 46 cents. Motion for a new trial overruled, and judgment upon the verdict. Appeal to this court by the plaintiff.

The motion for a new trial was founded upon an affidavit of newly discovered evidence. What diligence was previously used by the plaintiff to obtain his proof does not appear. In listening to such applications, courts of justice have always been extremely cautious, and have uniformly overruled them, where, upon using due diligence, the evidence might have been discovered before. 6 Bac. 672. Much is necessarily left to the discretion of the courts below in motions for new trials, and it requires a case much stronger than the present to induce us to interfere with them in questions of this kind.

It is contended by the plaintiff that the jury had no authority to find any amount in favour of the defendant. This question turns solely upon the pleadings in the cause. There was no such thing as a set-off, in these cases, at common law. By the English statutes authorizing the practice the defendant must plead the set-off specially, or give notice of the charges with the general issue.[5] These statutes of George the 2d are not in force in this country.[6] Since then the common law makes no provision, and the English statutes of set-off have not been adopted, we must rest the case entirely upon the act of assembly in our own state. By that, the defendant, if he would get in a set-off, must plead payment of the demand against him, and set out his charges in such plea.[7] In the case under consideration, there is no plea of payment, nor anything like one, in substance or form. Of course, matters of set-off were altogether inadmissible as evidence to the jury. With respect to the plea of non assumpsit, it may be observed that the defendant had a right under that to prove payment of the plaintiff's demand, and thus prevent a recovery against him, but nothing more. To have authorized a verdict for any amount against the plaintiff,

[5] Kershaw v. Merchants' Bank, 7 How. (Miss.) 386, 40 Am. Dec. 70 (1843); Concord v. Pillsbury, 33 N. H. 310 (1856). Accord.

[6] But statutes to substantially the same effect have been passed in most jurisdictions in this country. Some of the American statutes antedate the English. See 34 Cyc. 628, note 28.

[7] Patterson v. Steele, 36 Ill. 272 (1864: either payment with notice or general issue with notice or special plea); Ball v. Consolidated Co., 32 N. J. Law, 102 (1866); Glamorgan Co. v. Rhule, 53 Pa. 93 (1866); Richmond Co. v. Johnson, 90 Va. 775, 20 S. E. 148 (1894). Accord.

In some jurisdictions set-off must be given under the general issue with notice. Ferguson v. Millikin, 42 Mich. 441, 4 N. W. 185 (1880); Williams v. Crary, 5 Cow. (N. Y.) 368 (1826). In others it must be pleaded specially. Scatchard v. Memphis, etc., Co., 102 Tenn. 282, 52 S. W. 153 (1899) (semble). In others the statutes require the filing of a demand in set-off. See Pond v. Niles, 31 Me. 131 (1850); Rider v. Ocean Insurance Co., 20 Pick. (Mass.) 259 (1838); Choen v. Guthrie, 15 W. Va. 160 (1879).

Set-off is not admissible under the general issue. Marlowe v. Rogers, 102 Ala. 510, 14 South. 790 (1893); Mead v. Harris, 101 Mich. 585, 60 N. W. 284 (1894); Oldham v. Henderson, 4 Mo. 295 (1836); Sawyer v. Van Deren, 74 N. J. Law, 673, 66 Atl. 396 (1907); Stanley v. Turner, 68 Vt. 315, 35 Atl. 321 (1896); Richmond Co. v. Johnson, 90 Va. 775, 20 S. E. 148 (1894).

there should have been a plea of payment, and the defendant's charges therein set forth. No such recovery can be had but by virtue of our statute; and if a defendant do not bring his case within its provisions, he can derive no benefit under it. Here there was no plea of payment, and therefore, no matter what was the evidence, a verdict in favour of the defendant for any amount whatever cannot be supported. The charge of the court that there might be such a verdict in this cause is not warranted by the law. The furthest the jury could go, without a plea of payment, was merely to give a verdict in favour of the defendant. Beyond that point all the proceedings are erroneous, and must be set aside. The verdict will then stand for the defendant, upon which judgment will be rendered, and he will have his costs in the Circuit Court.

PER CURIAM. The judgment is reversed, and the proceedings subsequent to so much of the verdict inclusive as gives to the defendant 34 dollars and 46 cents are set aside, with costs. Cause remanded, etc.

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